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Supreme Court of the United States

OCTOBER TERM, 1957

No. 64

NATIONAL LABOR RELATIONS BOARD,
PETITIONER,

vs.

DISTRICT 50, UNITED MINE WORKERS OF AMERICA AND BOWMAN TRANSPORTATION, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petition for Certiorari
Filed January 2, 1957
Certiorari Granted February 25, 1957

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

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PETITIONER,

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DISTRICT 50, UNITED MINE WORKERS OF AMERICA AND BOWMAN TRANSPORTATION, INC.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,887

DISTRICT 50, UNITED MINE WORKERS OF AMERICA, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

No. 12,950

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

v.

BOWMAN TRANSPORTATION, INC., *Respondent.*

On Petition for Review of Original and Supplemental Order of the National Labor Relations Board

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Joint Appendix—Filed February 15, 1956

Volume I

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Stipulation—Filed November 29, 1955

It is hereby stipulated by and between the parties to the above-entitled cases:

* * * * * * * * * * *

3. That the following questions are presented in this proceeding:

a. Whether substantial evidence on the record as a whole supports the findings of the Board that Bowman Transportation, Inc.—

(1) Violated Section 8 (a) (1) of the National Labor Relations Act, as amended, by interrogating its employees concerning their union activities, and by engaging in surveillance of its employees with respect to such activities;

(2) Violated Section 8 (a) (3) and (1) of the Act by discriminating against employees Welch Gross and Joe Lackey because of their union activities;

(3) Violated Section 8 (a) (2) and (1) of the Act by assisting or contributing support to District 50.

b. Whether the Order of the Board directing Bowman Transportation, Inc. to withhold recognition from District 50 unless and until that organization is certified by the Board as representative of Bowman's employees, is a proper and lawful order.

11 c. Whether, under Section 10 (e) of the Act, the Court should consider question "b" inasmuch as it was not raised by any exception to the Intermediate Report.

MAURICE F. BISHOP
Counsel for Bowman Transportation, Inc.

E. CRAMPTON HARRIS
Counsel for District 50,
United Mine Workers of America

MARCEL MALLET-PREVOST
Assistant General Counsel,
National Labor Relations Board

Washington, D. C.,
November 14, 1955

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IR-583
Gadsden, Ala.

BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D. C.

Case Nos. 10-CA-1950, 10-CA-1985

BOWMAN TRANSPORTATION, INC.

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL, LOCAL No. 612

Mr. Edwin R. Hancock, of Atlanta, Ga., for the General Counsel.

Mr. Maurice F. Bishop, of Birmingham, Ala, for the Respondent.

Mr. George C. Hawkins, of Gadsden, Ala., for the Charging Union.

Before: Robert E. Mullin, Trial Examiner.

Intermediate Report—Filed November 26, 1954

STATEMENT OF THE CASE

This proceeding, brought under Section 10 (b) of the National Labor Relations Act, as amended, 61 Stat. 136 (herein called the Act), was heard in Gadsden, Alabama, from August 3 to August 5, 1954, inclusive, pursuant to an order of consolidation and due notice to all
676 parties.[1] The complaint in Case No. 1950, based on charges duly filed and served, alleged that the Respondent had engaged in unfair labor practices within the meaning of Section 8 (a) (1) and (3) of the Act by discriminatorily discharging one employee on November 22, 1953, threatening another with reprisals, and engaging in surveillance. In Case No. 1985, the complaint alleged that in May 1954, the Respondent, in violation of Section

[1] The General Counsel and the staff attorney appearing for him at the hearing are referred to herein as the General Counsel and the National Labor Relations Board as the Board. The above-named Company is referred to as the Respondent, and the Charging Party, likewise named above, as the Union or Teamsters.

8 (a) (1) and (2) of the Act, bargained and agreed upon the terms of a contract with District 50, United Mine Workers of America (herein called District 50) at a time when it did not represent a majority of the Respondent's employees and by various other acts and conduct assisted and supported that union. In its answers, the Respondent conceded certain facts with respect to its business operations but denied the commission of any unfair labor practices.

The General Counsel, the Respondent and the Teamsters were represented at the hearing by their attorneys. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce all evidence pertinent to the issues was afforded all parties. The parties waived oral argument. Subsequent to the hearing a brief was received from the General Counsel.

Upon the entire record in the case, and from my observation of the demeanor of the witnesses, I make the following:

FINDINGS OF FACT

I. The Business of the Respondent

Respondent, an Alabama corporation, is a common carrier engaged in the transportation of freight by motor vehicles. In the conduct of its business the Respondent operates throughout the southeastern States and maintains terminals at Gadsden, Anniston, and Birmingham, Alabama at Memphis and Chattanooga, Tennessee, at Atlanta, Georgia, and at Richmond, Virginia. During all times material herein the dollar volume of the Respondent's annual business exceeded $2,500,000, 98 percent of which was derived from the interstate transportation of freight. The Respondent concedes, and I find, that it is engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.

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II. The Labor Organizations Involved

The Teamsters and District 50 are labor organizations within the meaning of Section 2 (5) of the Act.

III. The Unfair Labor Practices

A. *Sequence of Events*

The Teamsters began an organizational campaign among Respondent's employees in November 1953. On November 22, the Respondent discharged Welch Gross, an issue herein. On November 23, the Union placed a picket line outside the entrance to the Company's Gadsden terminal. A considerable number of the employees then left their jobs and joined in the picketing which continued until December 28, when the Circuit Court of Etowah County, Alabama, issued a temporary restraining order. The Court's decree and various amendments thereto enjoined all picketing until May 17, 1954, when the Court removed its ban on peaceful picketing but made permanent that portion of its decree which forbade violence and misconduct on the picket line. Subsequent to that date the Union resumed its picketing of the Respondent's premises. At the time of the hearing this picketing was still in progress.

On May 22, after some of the employees had told Ralph M. Bowman, president of the Respondent, that they wanted a contract, and after several meetings with organizers for District 50, Bowman called all his drivers in for a
678 special meeting. After a poll of those present in which a majority signified that they wanted District 50 to represent them, Bowman withdrew from the meeting. Later in the day he met with representatives of District 50 and signed a contract which, along with various other provisions, provided for union security and a checkoff of the employees' union dues.

B. *Case No. 1950, the Allegations, the Evidence and Conclusions With Respect Thereto*

The General Counsel alleged that the Respondent engaged in surveillance of a Teamsters' meeting, discriminatorily took Joe Lackey, one of its drivers, off his regular run and discriminatorily dismissed Welch Gross, another driver. These allegations were denied by the Respondent in their entirety.

Organizational activities among the Respondent's employees began early in November and on about November 14, Carl Renfroe, assistant business agent for the Team-

sters, met with several of the drivers. On November 21, a second meeting was held, at which about 20 employees were present. Among those in attendance were Joe Lackey and Welch Gross. About 30 minutes after the conclusion of the meeting and while some 8 to 10 employees were still gathered at the site, both Ralph M. Bowman and Donald B. Lockridge, president and vice president, respectively, of the Respondent, appeared, greeted those present in a casual manner and then departed.

The following morning, while some 15 to 20 drivers were gathered at the terminal, Mr. Bowman spoke to several of the men. According to Lackey, the company president said to him "Joe, you are the biggest liar of all. You promised me before when we had this labor trouble
679 here that you'd never be mixed up in this Union no more." Lackey further testified that Bowman then told him that his vacation was over and from that point forward he would have to take runs as the other drivers did.[2] Bowman then asked if Lackey would refuse another trip and the latter told him he would accept anything offered. Bowman thereupon spoke to Welch Gross and told him he was being discharged for "tearing up my trailer." After making this statement the company president turned to William Moon, another driver, and declared "You, of all guys, I can't see why that you would do me this way after what I've done for you."[3] To J. P. Jordan, another driver in the group, he stated "Take Brother Jordan, he is trying to play both ends and the middle . . . he's told around over here that he has . . . a friend in the office . . . as of now he doesn't have any."[4]

The following day, M. R. Sherman, business agent for the Teamsters, endeavored to meet with Bowman. After

[2] Lackey's testimony in this connection was corroborated by J. P. Jordan and Herschel White. Bowman denied having mentioned the Union on this occasion but he conceded that he called Lackey a liar. In view of the extensive corroboration in the record for Lackey's version of this conversation, I credit his testimony in this regard rather than that of the company president.

[3] Bowman had paid for an extended hospitalization that Moon experienced sometime before. At the hearing he testified that he understood the men at the Burns Park site were gambling when he had seen them and that his concern for Moon had risen from the fact that he felt that it was ill-advised for anyone in Moon's straits to be gambling.

[4] Bowman testified that he told Jordan he understood Jordan had a friend in the office.

making several attempts to reach him by telephone, Sherman went to the terminal. There, Bowman's secretary told him that the company president was too busy to see him. Late that afternoon the Teamsters established a picket line before the Respondent's Gadsden headquarters.

1. Surveillance

The General Counsel's allegations that the Respondent's officials engaged in surveillance of the union meeting on November 21 was denied by the Respondent. The latter conceded, however, that Bowman and Lockridge had visited the site of the meeting. Both of these officials testified that they had done so merely out of curiosity, that they had no knowledge either before or after their visit that a union meeting was in progress or had been held at the scene and that the only employee who spoke to them while there told them that the men were "shooting craps."

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The union gathering assembled at Burns Park, a site within the city limits of Gadsden but in a somewhat isolated area, three quarters of a mile off a main highway and at the dead end of an unpaved road. Apart from a water tower, near which the meeting was held, there are no buildings or structures of any kind in the immediate vicinity. It is one and one-half miles from the Respondent's place of business.

The explanation offered by Bowman and Lockridge for their presence at this out-of-the-way location coincidentally with the Teamsters' meeting might be acceptable were it not for other testimony in the transcript. Thus, Jordan testified that early on the afternoon of November 21, Lockridge, whom he had known for 30 years, drove up to his home, initiated a conversation about the Union and questioned him as to where the meeting was to be held that afternoon. When Jordan declined to discuss the matter, Lockridge departed.[5] The following morning, when Jordan

[5] The foregoing findings are based on the testimony of Jordan. Lockridge denied this account in its entirety and testified that he had never visited Jordan at his home. The latter, however, was corroborated by two neighbors, Cecil Horsley and Jake Parker, who credibly testified that they recalled having seen Lockridge drive up to Jordan's house on the day in question. The testimony of these last named was most persuasive and withstood a searching cross-examination. Lockridge's denial, on the other hand, was unconvincing. Accordingly, I credit the testimony of Jordan.

arrived at the terminal, Lockridge called him into his office and stated that he wanted to know about the Union
681. that had been stirred up. When the employee denied any knowledge of the matter, Lockridge told him that he already knew who the ringleaders were and then cautioned Jordan not to lie about his answers or he would be in trouble.[6] That same morning in the presence of Lockridge, Bowman told Jesse Blackburn, one of the drivers who had been at Burns Park the day before, that he wanted to know what had transpired at the meeting behind the water tank. When Blackburn suggested that it was improper for a company official to have been there, Bowman told him he was "just looking around."[7]

In view of Lockridge's attempt on November 21 to learn the location of the union meeting and the subsequent interrogation of two of the drivers by both Lockridge and Bowman on the subject matter of that meeting and the extent of employee organization, the presence of these officials at the isolated site where the union gathering was held can not be dismissed as a mere coincidence. It is my conclusion and, I find, that, at the time, they were engaged in unlawful surveillance of the employees' union activities and that by reason of such conduct the Respondent violated Section 8 (a) (1) of the Act.

2. The alleged discrimination as to Lackey

Lackey was among the first to become active in the Teamsters' campaign and attended both of the organizational meetings. On November 21, he was among the group of drivers to whom Bowman spoke when visiting Burns Park that day. The following morning the company president, as found above, chided Lackey for having anything to do with the Union, announced that henceforward
682 he would have to take any assignment available, and then offered him a run to Warner Robbins Air Force Base in Georgia. Lackey accepted this assignment, but had no others subsequent to that time for, upon completing this

[6] This was denied by Lockridge. His denial in this connection, however, was no more convincing than his disavowal referred to in the preceding footnote.

[7] The findings as to this incident are based on the credit testimony of Blackburn, which, in this regard, was undenied.

trip, he joined in the picketing which the Teamsters initiated at the Respondent's premises on November 23.

The General Counsel contends that for a lengthy period prior to November 22, the Respondent frequently assigned Lackey to its Gadsden-Decatur run in order that Lackey, whose wife was suffering from a prolonged illness, would not be compelled to remain away from home overnight, that on November 22, when Bowman announced that he was rescinding this practice it was because of Lackey's union activities, and therefore discriminatory.

The employee testified that about 2 years prior to November 22 he had told Bowman that because of his wife's illness he would prefer not to drive any runs which would keep him away from home overnight. According to Lackey, thereafter he sometimes made trips to other points besides Decatur, but more frequently he was assigned to the Gadsden-Decatur run which could be completed in a single day and thus enable him to be home at night. This testimony was corroborated by an exhibit received at the hearing which revealed that out of approximately 142 of his dispatches, 122 were to Decatur, Alabama. During the period covered by this exhibit Lackey completed all runs to Decatur in a single day and was away from Gadsden during his other trips on approximately 5 different nights. In support of its position that there was no discrimination or threat of discrimination in the case of this employee, the Respondent offered some testimony to the effect that as an irregular route carrier it had no set runs and that none of its drivers was assigned to any
683 specific route. On the other hand, Fred Marler, the Respondent's dispatcher and its principal witness on this issue, conceded that for several months prior to November 22 he had made an effort to give Lackey the Decatur runs "because his wife was in ill health and he wanted to stay as close to home as possible to be with his wife."[8] Even Bowman corroborated this testimony. Rather significantly, the Respondent offered no evidence that during the preceding two years any driver other than Lackey had been dispatched on a trip from Gadsden to Decatur.

On the foregoing facts it is plain that for a considerable period prior to November 22 the Respondent endeavored

[8] The quotation is from Marler's testimony.

to give Lackey a specific assignment that worked to his personal advantage. It is equally clear that when Bowman told him "your vacation is over" and that he would have to accept runs as did the other drivers that this favorable arrangement was threatened, if not at an end. Since Bowman prefaced this announcement by describing Lackey as a "liar" and deriding him for having gone back on a promise "never to be mixed up in this Union no more," it is my conclusion, and I find, that, in making his statement that the arrangement as to Lackey's assignments was being terminated, Bowman was motivated by his discovery on the preceding afternoon that this employee was actively supporting the Teamsters. In view of the fact that the threat to lose or the actual loss of such a preference as Lackey enjoyed at that particular time would seriously affect his working conditions, and the tenure of his employment, Bowman's announcement was coercive and a violation of Section 8 (a) (3) and (1).

3. Welch Gross

At the time of his discharge, Gross had been an over-the-road driver for approximately 11 months. He
684 first attended a union meeting on November 21 and at that time signed a card authorizing the Teamsters to represent him. Gross was dismissed on November 22, as mentioned earlier, when President Bowman told him he was "fired for tearing up my trailer." In its answer, the Respondent offered two additional reasons for Gross' termination, viz., failure to file an accident report and falsification of his daily logs. At the hearing, Bowman testified that he discharged Gross for all three of these reasons.

Gross had had an accident on or about October 26 in which his trailer was damaged. On returning to the terminal he told Marler, the dispatcher, and Rufus Thacker, the dock foreman, about having had an accident and that he was willing to pay for the damage. The latter suggested that he see Bowman about the matter. This much of Gross' testimony was corroborated by Marler. The latter also testified that he told Gross to make out an accident report and talk to Mr. Bowman about it. Gross credibly testified that no one ever asked him to prepare and file such a report. Pursuant to an order from his

superiors, on about November 12, Gross pulled the trailer to a maintenance shop in Birmingham where it was repaired at a cost of approximately $280.

It was undisputed that on the morning of November 21, Bowman held a meeting with the drivers at which he expressed concern at the number of recent accidents, and declared that apparently it would be necessary to make the drivers pay for their damages in order to cut the accident rate. After the meeting Gross followed Bowman into his office. According to the employee, at this time he told the company president that he would like to pay some more on the trailer because he did not feel
685 that he had paid enough,[9] that Bowman told him that this would be satisfactory and that Gross should make arrangements for doing so with Rufus Thacker, the dock foreman. Gross further testified that after leaving Bowman's office he reported this conversation to Thacker and discussed with him an arrangement whereby the Company would deduct a regular amount from each check until the repair bill was satisfied.[10]

Bowman's version of this conversation was somewhat different. According to the latter, Gross followed him into his office, remarked, "I guess that meeting was held for my benefit," and stated that he wanted to pay for the damage to the trailer. Bowman testified that he told the employee the damage should have been paid for before then and that he concluded the meeting with the statement that he would look into the matter and inform Gross of his decision later.[11] According to Bowman, after Gross left his office, at about noon on November 21, he requested Frank Wofford, secretary-treasurer of the Company and the one in charge of the business records, to bring him Gross' file. Bowman testified that this was the first op-

[9] Gross testified that earlier a fellow employee reported a conversation between Marler and Bowman which led him to believe that his liability for the trailer damage would be satisfied by his not getting paid for the trip to Birmingham. Both Bowman and Marler denied that there was any basis for such an assumption. On the other hand, Gross was not paid for his Birmingham run in the normal course of events. Not until February 4, 1954, some 10 weeks after his discharge, did he receive a check for the mileage driven on this trip. The Respondent offer no explanation for this long delay.

[10] The Respondent never called Thacker as a witness.

[11] Gross testified that, insofar as he could recall, Bowman said nothing about withholding a decision on the matter until a later date.

portunity he had had to examine Gross' record and that on doing so he discovered that the driver had never filed an insurance report on the accident to the trailer, and, further, that on comparing the insurance observation reports[12] in Gross' file with the logs which he had sub-
686 mitted on these dates it was immediately apparent that Gross had falsified certain of his logs. According to the company president, at that point he decided to fire the employee. Bowman's testimony about examining the company file on Gross was not contradicted and it was corroborated by Wofford.

Plainly, the Company had a well-established rule that all accidents had to be reported to the company office. If the damage exceeded $100, a report had to be filed with the insurance carrier and with the Interstate Commerce Commission. From the record, however, it does not appear that the driver himself had to file any written memorandum to satisfy the reporting requirement. Bowman testified that drivers have "to report [accidents] to the office as soon as they come in" and that if the damage exceeds $100 a report is filed with the Interstate Commerce Commission. None of the Respondent's witnesses testified that the driver was required to file a written report of an accident in any specific manner and no forms for such reporting were offered in evidence. For this reason and from the testimony of Mr. Bowman it is my conclusion that the driver make an oral report to a responsible supervisor or official in time for the latter to notify the insurance company and to prepare the requisite memorandum for the Interstate Commerce Commission.[13] On this basis Gross had satisfied the requirement, for his testimony about having reported orally to Marler on the accident was confirmed by the dispatcher while the latter was on the stand.

There was much testimony as to the responsibility of the individual driver for keeping an accurate daily
687 log. Several of the company witnesses testified that, in compliance with the regulations of the Interstate

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[12] These were submitted to the Company at frequent intervals by the patrols which its insurance carrier provided.

[13] See also, ICC, Motor Carrier Safety Regulations (1952), pp. 48-50 wherein the responsibility for filing such reports with the Commission is placed on the motor carrier rather than the driver.

Commerce Commission,[14] no employee was permitted to drive in excess of 10 hours per day or 60 hours per week, that each driver was required to keep an accurate daily log of the hours driven, and that the penalty for falsification of his log was discharge. On the other hand, Marler could recall no case other than Gross' in which this penalty had been imposed. Bowman testified that, in addition to Gross, one William Hyatt was discharged "partly" for falsifying his log.[15] There was testimony from certain Witnesses[16] produced by the General Counsel which would tend to prove that some of the drivers not infrequently exceeded the 10-hour limit without reprimand. However, the record contains no convincing evidence that the company officials were either aware of those particular infractions of the 10-hour rule about which some of the witnesses at the hearing testified or that they tacitly condoned the practice.

At the hearing the Respondent offered in evidence 4 driving reports made on Gross by the insurance carrier which indicated that the employee's daily logs submitted on the 4 separate days covered by those reports were false. Gross admitted that the logs in question were inaccurate and that they did not reflect his actual driving time. He also conceded that no company official had instructed him to falsify his logs.

688 According to Bowman he reached his decision to discharge Gross on November 21, without knowledge of any kind of the employee's union interests. He further testified that he had not seen Gross at Burns Park when he and Lockridge visited that point later in the day. This latter testimony, however, is quite implausible for at the time only 8 to 10 employees were in the area and Gross and Lackey were seated together in the same car. In

[14] Ibid. pp. 50-56.

[15] Hyatt was called by the General Counsel in rebuttal and testified that he had never been told that log falsification had anything to do with his discharge. Bowman testified that at the time of the discharge he told Hyatt that he was fired for going to sleep at the wheel and for "running over his hours." Nevertheless, only a short while thereafter Bowman rehired Hyatt and kept him as an employee despite two subsequent accidents in which Hyatt was involved. One of these occurred only a few months before Gross' discharge and was was an accident of almost the same nature as Gross had had. Hyatt however, was neither dismissed because of it nor did he have to pay for the damage incurred.

[16] Blackburn and Jordan.

view of Bowman's comments to Lackey the next day, related earlier herein, it is plain that he had noted the presence of that employee at the meeting site the preceding afternoon.[17] Consequently, it seems reasonable to conclude, as I do, that on the same occasion Bowman also saw Gross.

If Mr. Bowman's testimony is accepted, then it would appear that he arrived at his decision to fire Gross at about noon on November 21, when the Respondent could not have known about the latter's union activity, immediately upon discovering that the employee had inaccurate logs in his file and had never made out an accident report. For a number of reasons I am forced to the conclusion that Mr. Bowman's testimony cannot be credited.[18] Foremost among these was a reaction gathered by the Examiner from the demeanor and bearing of this witness. Then, too, there is the fact that, despite Bowman's statement that he decided upon Gross' dismissal because
689 of his concern about the employee's misleading logs and the lack of an accident report in the file, at the time when Gross was actually dismissed, Bowman never mentioned these alleged reasons. Instead, he declared only that the employee was being discharged because of the accident involving the trailer. Had Bowman decided upon this action as a disciplinary warning to the other drivers that accurate logs and accident reports were a necessity it seems strange indeed that the company president did not so state to the assembled employees on the morning of November 22. Instead he began his remarks by denouncing Lackey, Moon and Jordan for their union activities and declaring that Lackey's domestic problems would no longer be considered in that employee's future assignments. Almost in the same breath he declared that Gross was fired for damaging his trailer. In addition to the

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[17] Lockridge testified that he and Bowman "spoke to all of [the employees] when we walked up there."

[18] Although Mr. Bowman testified that he decided upon Gross' discharge at this time, there is no evidence that he expressed this intention to anyone until the following morning when he notified Gross. As an uncommunicated intention, therefore, his testimony as to the moment he arrived at this decision was hardly susceptible to cross-examination. Even if it be assumed that this testimony was not controverted by Bowman's subsequent conduct and that it was uncontradicted, that in itself does not compel its acceptance. N. L. R. B. v. Howell Chevrolet Co., 204 F. 2d 79, 86 (C. A. 9), affirmed 346 U. S. 482; N. L. R. B. v. Dinion Coil, Inc., 210 F. 2d 484, 486-487 (C A 2).

foregoing evidence of Bowman's grave displeasure regarding the employees' interest in a union, as found earlier, at about the same time that Bowman was allegedly checking Gross's file, Lockridge, his vice president, was contacting Jordan to discover, if possible, where the union meeting was to be held. Later that day he and Bowman searched for, and found, the site of the organizational meeting where Lackey, Gross and other employees were observed. Not until the Respondent filed its answer to the complaint in Case No. 10-CA-1950 did it allege that Gross was discharged for falsification of his logs and failure to report the accident. Despite Mr. Bowman's testimony at the hearing that these were among the reasons for Gross' dismissal, he did not testify that he had ever so informed the employee. Nor did the Respondent offer any independent evidence that would tend to prove Mr. Bowman's self-serving declaration as to the moment he decided to fire Gross. Plainly, Gross' failure to keep an accurate log might have been an adequate ground for his dismissal.
690 Here, however, it is my conclusion, on the foregoing evidence, that the Respondent's purported concern about Gross' inaccurate logs arose subequent to his discharge and not before.

I am also convinced that there was little substance to Mr. Bowman's assertion that among the other reasons for the employee's dismissal was Gross' failure to report the accident and the damage done to the trailer. As found earlier herein Gross, in fact, had promptly reported the accident to Marler and it was admitted that, at that time, he had offered to pay for the damage. In addition there was the testimony of Gross, which I now credit, that on November 21, Bowman stated that it would be satisfactory if Gross made arrangements with Thacker, the dock foreman, to pay for the repairs to the trailer. Such a statement would indicate that at that point, insofar as Bowman was concerned, the incident was closed. Under these circumstances, and on the foregoing facts, it is my conclusion that the motivating cause for Gross's discharge on the morning of November 22 was the knowledge, acquired by the Respondent on the preceding afternoon, that Gross was interested in the Teamsters. Although Bowman may have had some cause for dissatisfaction with this

employee's work prior to that time, as the Court of Appeals for the Third Circuit observed in a somewhat similar case, "it apparently became intolerable only after he had joined the Union." *N. L. R. B.* v. *Electric City Dyeing Co.*, 178 F. 2d 980, 983 (C.A. 3). In view of these findings, it is my conclusion that the real cause for Gross' discharge was his interest in the Teamsters and not the reasons assigned by the Company. Accordingly, I find that by this action the Respondent violated Section 8 (a) (3) and (1) of the Act.

There remains the question as to whether Gross disqualified himself for reinstatement either by the man-
691 ner in which he kept his logs prior to his discharge or by any of his picket line activity in the period subsequent thereto. Respondent's officials testified that the penalty for keeping false or inaccurate logs had always been discharge. Mr. Bowman, who had been in the trucking business for many years, could testify to only one discharge prior to Gross', that of Hyatt, which he attributed, in part, to false logs. Since this employee was rehired shortly after his discharge, quite obviously the Respondent itself did not consider the man unfit for further employment because of his failure to keep accurate logs. Consequently, it would not appear that Gross should be denied reinstatement on this ground. At the hearing the Respondent endeavored to prove that Gross' picket line conduct was such as to place him beyond the pale of the Act. In this connection the Examiner ruled that any evidence which would tend to prove that Gross was involved in any specific misconduct would be received. The Respondent offered the pleadings filed in the State injunctive proceeding as well as the opinion and the decree of the Court which enjoined all picketing for a period of months. Apart from indicating that such violence and misconduct may have occurred during the long strike, neither these records nor the transcript in this case present any evidence that Gross himself participated in any unprotected concerted activity throughout this period. "Unauthorized acts of violence on the part of individual strikers are not chargeable to other Union Members in the absence of proof that identifies them as participating in such violence." *N. L. R. B.* v. *Deena Artware, Inc.*, 198 F. 2d 645, 652 (C.A. 6)

In the light of the present record, therefore, it is my conclusion that Gross is qualified for reinstatement.[19]

692 *C. Case No. 1985; the Allegations, the Evidence and Conclusions with Respect Thereto*

The General Counsel alleged that the Respondent illegally assisted District 50 in violation of Section 8 (a) (2) and (1) of the Act. According to the Company, it recognized District 50 only after a poll of its employees proved that that organization represented a majority. It denied all allegations of illegal assistance.

In May 1954, as noted earlier, the State Court injunction entered against the Teamsters was modified so as to permit peaceful picketing. That union then reestablished its picket line in front of the Company's Gadsden terminal. Abourt May 10, John Wilson[20] and two other drivers called on Bowman. According to Wilson, he told Bowman the employees would like to have a contract and that he had been in touch with an organizer for District 50. A few days later Wilson and four other employees met with Bowman again. Wilson testified that at this meeting the pay scale which would be acceptable to the drivers was discussed, that the committee urged Bowman to meet with District 50 officials in Birmingham to consider a contract, and that Bowman agreed to call his drivers together for a meeting in Gadsden where a poll could be taken on the question of whether the men cared to have District 50 represent them.

About the middle of May, Edward Peyton, an organizer for District 50, met with Bowman, told the latter he represented a majority of the employees and suggested that they meet in Birmingham the following week. Pursuant to this suggestion, on about May 20 and 21, Bowman and his attorney, Mr. Maurice F. Bishop, met with Peyton

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[19] I also find that, in the context of discrimination against Lackey and Gross, the interrogation of Jordan and Blackburn as to the Union meeting by Lockridge and Bowman, constituted independent violations of Section 8 (a) (1) of the Act Sears Roebuck & Co., 109 NLRB No. 102, fn. 2; Dalton Company, 109 NLRB No. 175.

[20] Wilson enjoyed a somewhat different status from that of the other drivers. He was a brother-in-law of Bowman and owned two tractor-trailers, one of which he drove for the Company; the second he leased to the Respondent.

693 and E. E. Hollifield, the latter being Regional Director for District 50, and on two successive days discussed the terms of an agreement.[21] According to Mr. Hollifield, the parties considered at length the draft of a proposed contract, among the provisions which received the greatest attention being those on wages, seniority, vacations, and grievances and arbitration. Bowman testified that at these meetings he did not ask the representatives of District 50 for any proof of their claim to majority representation but that he discussed a contract with them on the assumption that they were authorized to do so.

Immediately after these conferences Bowman notified all pickup men, delivery men and drivers at his terminals in Gadsden, Chattanooga, Birmingham, Atlanta and Memphis that they were to meet at the company headquarters in Gadsden on Saturday, May 22. About 75 employees arrived for this meeting.[22] Included in the audience were Frank Wofford, secretary-treasurer of the Respondent, and Terminal Managers Ralph Cannon and James Armstrong. Bowman called the meeting to order and then asked that all those who wanted District 50 to represent them to signify by raising their hands. All present did so. He then asked for those opposed to that organization to signify their opposition in the same manner, but no one expressed any dissent. After he had polled the men a number of them questioned him about the type of contract they could anticipate. At the same time authorization cards were distributed among the employees.[23] In addition to authorizing District 50 to represent the
694 signer, these cards also authorized a checkoff of union dues from the signatory's wages. According to Walter H. Howran, one of the drivers present, in response to a question from some of the men as to what they would have to do about paying their union dues, Bowman stated that "if th[illegible] want to pay them today and have to

[21] Peyton attended only the first day of these negotiations.

[22] The Company supplied gas for transportation of those from out-of-town terminals in the same manner that it bore its employees' travel expenses to a regular business meeting.

[23] At the hearing Bowman was asked whether District 50 cards were distributed immediately after the polling. He answered: "There were some cards around there and employees were signing them."

pay them today—he would advance it to them from their next week's paycheck and give them the money." Shortly thereafter, Bowman withdrew from the meeting. Some 63[24] signed cards were then collected from those present. The employees then voted on a slate of officers for a local organization of District 50 and Wilson was elected president.

During a recess in the meeting Wilson met with Peyton and Hollifield in downtown Gadsden where, at about 2:30 p.m., he turned over the signed cards to the latter, the first they had actually received.[25] Hollifield then telephoned Bowman to tell him that he wanted to arrange a meeting with the latter's employees. Bowman suggested that since District 50 represented 51 percent of his men the meeting could be held at the terminal that afternoon. Hollifield accepted and, with his associate Peyton, went out to company property where he spent sometime discussing the objectives of his organizations with the employees. Then the representatives of District 50 met with Bowman and after a meeting which lasted an hour or two executed a collective bargaining agreement which, among other things provided for recognition of District 50 as exclusive bargaining agent of all drivers, pickup men and delivery men, contained a union-security clause which gave District 50 a checkoff of union dues, granted the employees slightly better vacation benefits than they had previously enjoyed, established a lower pay scale for the drivers than
695 they were getting currently[26] and had a section on grievances and arbitration. Mr. Bowman testified that since May 22 the Company had been checking dues off the pay of all employees who signed cards and that, in addition, pursuant to an agreement with District 50, initiation fees amounted to $7.50 per member, had been taken out of the employees' pay.[27]

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24 Peyton testified he received this number that afternoon.

25 Wilson testified that prior to Bowman's poll of the employees on May 22, neither he (Wilson) nor anyone else had signed an authorization card.

26 The contract provided for pay at the rate of 6 cents a mile. At the time and throughout the strike the Company had been paying 6½ cents. Before the picketing began drivers received 5¾ cents per mile.

27 He also testified that no money was transmitted to District 50 before it was checked off the employee's pay.

At the hearing the Respondent seemingly endeavored to prove that the contract which emerged from the meeting on May 22 was the result of negotiations had on that day and that it differed materially from the draft which the parties had discussed in Birmingham earlier that week. This, however, did not accord with the testimony of the parties. Thus, Hollifield testified that on May 22, apart from the insertion of a new provision on grievances and arbitration, only two minor changes were made in the draft which had been negotiated in Birmingham.[28] Bowman's testimony was substantially to the same effect. From the record it appears that, aside from the parties, only Wilson had a copy of the draft contract before the meeting. He testified that he took it to the terminal on the morning of May 22 and made it available to the drivers who were arriving for the meeting so that, according to Wilson, it was a subject of conversation among the men before Bowman opened the meeting and polled them on their preference.

696 CONCLUDING FINDINGS

In singular contrast with the Teamsters' inability to contact Bowman and present their claim to represent his employees, noted earlier in Case No. 1950, very shortly after his brother-in-law, Wilson, indicated that District 50 had an interest in representing the drivers, and without any proof of its claim to a majority, the company president began conferring with officials of the latter union. At this point not a single employee had actually signed a card in District 50, for it was not until after Bowman's poll that any of the drivers signed cards authorizing that union to represent them. Nevertheless, despite the lack of any such authority, company and District 50 representatives conferred for 2 days in negotiating the details of a contract. Then, a copy of their draft agreement was given to Wilson and on May 22 all employees at the different terminals were brought to Gadsden at company expense and in the same manner as if they were to attend a regular business meeting. Before Bowman called

[28] One of these changes related to the manner in which the employer was to remit checked off dues; the other merely involved the insertion of the word "Union" wherever the word "Local Union" appeared in the original draft.

them to order, Wilson had had an opportunity to show the draft contract to the drivers present. With so many manifestations of the Company's preference it was not surprising that on the show of hands requested by Mr. Bowman, all present voted for District 50. Thereafter the company president answered queries about the terms of an agreement with District 50 and when a question was raised as to the employees' liability for dues in the new organization, Bowman assured his audience that if necessary he would advance the money. Then in rapid succession and within less than three hours: (1) the employees signed cards authorizing District 50 to represent them and authorizing the employer to deduct dues from their wages; (2) a local union was established and Wilson was designated as its president; (3) at Bowman's suggestion, representatives of District 50 held their first meeting
697 with the employees at the company terminal, even though this required that they cross the Teamsters' picket line; and then (4) these same organizers met with Bowman to put the finishing touches on a contract, all the material provisions of which, except one,[29] had been negotiated several days before. On these facts, it is my conclusion, and I find, that the Respondent rendered illegal support and assistance to District 50 and interfered with the free choice of employees to join or not join a labor organization within the meaning of Section 7 and Section 8 (a) (2) and (1) of the Act. *Knickerbocker Plastic Co., Inc.*, 96 NLRB 586, 587; *Meyer & Welch, Inc.*, 91 NLRB 1102, 1112-1113; *Sears Roebuck & Company*, 110 NLRB No. 30; *Standard Transformer Company*, 97 NLRB 669, 677-678, 680-681, enforced 202 F. 2d 846 (C.A. 6).

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondent set forth in Section III, above, occurring in connection with its operations described in Section I, above, have a close, intimate and substantial relation to trade, traffic and commerce among the several States and tend to lead to labor disputes bur-

[29] That on grievances and arbitration.

dening and obstructing commerce and the free flow of commerce.

V. The Remedy

As it has been found that the Respondent has engaged in, and is engaging in unfair labor practices, it will be recommended that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

698 Since I have found that the Respondent discriminated with respect to the hire and tenure of employment of Welch Gross, the customary recommendation would be that the Respondent offer him immediate and full reinstatement. The day after his discharge, however, Gross joined in the Teamsters' picketing of the Respondent's terminal which was still in progress at the time of the hearing. Under these circumstances, I will recommend that the Respondent offer Gross, upon his application, reinstatement to his former or substantially equivalent position without prejudice to his seniority or other rights and privileges. I shall also recommend that the Respondent make him whole for any loss of pay he has suffered or may suffer by reason of the Respondent's refusal, if any, to reinstate him, by payment to him of a sum of money equal to that which he normally would have earned as wages (1) from the time of his discharge until he went on strike and (2) from the date of his application to return to work until the date of the Respondent's offer of reinstatement. *Knickerbocker Plastic Co.*, 104 NLRB 514, 539. The back pay provided for herein shall be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Company*, 90 NLRB 289; earnings in one particular quarter shall have no effect on the back-pay liability for any other period.[30]

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[30] As stated above, I am convinced that the Respondent discriminated against Gross because of his participation in union activities and that only in the event it is ordered to take the steps outlined herein will its conduct be remedied. Although I have rejected, for the reasons already stated, the Respondent's contention that Gross was discharged for failure to keep accurate logs in performance of his duties as a driver and although I do not believe, on the basis of the Company's action with respect to Hyatt that Gross' failure in this regard renders him manifestly unfit for further employment by the Respondent, I wish to emphasize that in complying with these recommendations the Company is in no manner precluded from enforcing by discharge, or any other disciplinary action, all nondiscriminatory rules that are designed to insure the strict adherence of its drivers to the regulations of the Interstate Commerce Commission.

699 Since I have found that on November 22, the Respondent discriminatorily changed its assignment practice with respect to Joe Lackey, I shall recommend that upon the latter's return to work,[31] his future assignments be made on a nondiscriminatory basis and without penalty for his having engaged in concerted and union activities.

Since I have found that the Respondent assisted and contributed financial and other support to District 50, the effects of this interference, as well as the Respondent's continued recognition of District 50 as the bargaining representative of its employees, constitute a continuing obstacle to the free exercise by its employees of their rights to self-organization and to bargain collectively through representatives of their own choosing. I will therefore recommend that the Respondent withhold recognition of District 50 and refrain from dealing with it unless and until it shall have been certified by the Board as the collective bargaining representative of the Respondent's employees. Having found that the agreement entered into between the Respondent and District 50 has been a means whereby the Respondent has utilized an employer-assisted labor organization to frustrate self-organization and defeat genuine collective bargaining by its employees, I will recommend that the Respondent cease giving effect to any agreement between it and District 50, or to any modification or extension thereof. Nothing in this recommendation should be taken, however, to require the Respondent to vary those wage, hour and other substantive features of its relations with the employees themselves, if any, which the Respondent has established in performance of this agreement. Further, because of the circum-
700 stances in which the checkoff authorizations were secured, as set forth in the findings hereinabove, and as a means of restoring the *status quo*, I shall recommend that the Respondent reimburse each employee for the amount of fees and dues which the Company has checked off his wages and paid over to District 50.

I will also recommend that the Respondent, upon reasonable request make available to the Board and its agents,

[31] At the time of the hearing, Lackey was among those still picketing the Respondent's terminal.

all payroll and other records pertinent to an analysis of the amount due as back pay.

Since I have found that Respondent, by various acts, interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in the Act and particularly because of the discriminatory discharge of Gross and the unlawful assistance to District 50 I am persuaded that the unfair labor practices committed are related to other unfair labor practices proscribed and that the danger of their commission in the future is to be anticipated from Respondent's conduct in the past. Accordingly, in order to make effective the interdependent guarantees of Section 7 and thus effectuate the policies of the Act, I will recommend that the Respondent cease and desist from in any manner infringing upon the rights of employees guaranteed by the Act. *May Department Stores* v. *N. L. R. B.*, 326 U.S. 376, 386-392.

CONCLUSIONS OF LAW

1. The Teamsters and District 50 are labor organizations within the meaning of the Act.

2. By discriminating in regard to the hire and tenure of employment of Welch Gross and Joe Lackey, thereby discouraging membership in the Teamsters, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (3) of the Act.

701 3. By interfering with the administration of District 50 and contributing support to it, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (2) of the Act.

4. By interfering with, restraining and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce, within the meaning of Section 2 (6) and (7) of the Act.

RECOMMENDATIONS

Upon the basis of the foregoing findings of fact and conclusions of law and upon the entire record in the case, I recommend that Respondent, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in the Teamsters, or any other labor organization of its employees, by discharging or refusing to reinstate any of its employees or by discriminating in any other manner in regard to their hire or tenure of employment, or any term or condition of their employment;

(b) Interfering with the administration of District 50 or contributing support to it, or to any other labor organization;

(c) Giving effect to the collective bargaining agreement, dated May 22, 1954, between the Respondent and District 50, or to any extension, renewal or modification thereof, or any other contract agreement between the Respondent and the said labor organization which may now be in force;

702 (d) Recognizing District 50 as the representative of any of its employees for the purpose of dealing with the Respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until the said labor organization shall have been certified as such representative by the Board;

(e) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist the Teamsters, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

2. Take the following affirmative action, which I find will effectuate the policies of the Act:

(a) Offer to Welch Gross, upon his application, immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of pay he may have suffered by reason of the Respondent's discrimination against him, in the manner provided in the section hereof entitled "The remedy";

(b) Offer assignments to Joe Lackey, upon his reemployment, without discrimination because of that employee's union or concerted activities;

(c) Withdraw and withhold all recognition from District 50, as the representative of its employees for the purpose of dealing with the Respondent concerning grievances,
labor disputes, wages, rates of pay, hours of em-
703 ployment, or other conditions of employment, unless
and until said labor organization shall have been certified as such representative by the Board;

(d) Reimburse all its employees whose initiation fees and membership dues in District 50 were checked off, for the amounts thus deducted from their wages since May 22, 1954;

(e) Post at all its terminals, copies of the notice attached hereto and marked Appendix A. Copies of said notice, to be furnished by the Regional Director for the Tenth Region, shall, after being duly signed by the Respondent, be posted by it immediately upon receipt thereof, and maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material;

(f) Notify the Regional Director for the Tenth Region, in writing, within 10 days from the date of this Intermediate Report what steps the Respondent has taken to comply therewith.

I also recommend that unless on or before 20 days from the receipt of this Intermediate Report the Respondent notifies the said Regional Director in writing that it will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring the Respondent to take the action aforesaid.

APPENDIX A

NOTICE TO ALL EMPLOYEES

PURSUANT TO

THE RECOMMENDATIONS OF A TRIAL EXAMINER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

WE WILL NOT discourage membership in INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL NO. 612, AFL, or in any other labor organization of our employees, by discharging or refusing to reinstate any of our employees, or in any other manner discriminating in regard to their hire or tenure of employment, or any term or condition of their employment.

WE WILL offer to Welch Gross, upon his application, immediate and full reinstatement to his former or substantially equivalent position, without prejudice to any seniority or other rights and privileges previously enjoyed, and make him whole for any loss of pay suffered as a result of the discrimination against him.

WE WILL offer assignments to Joe Lackey, upon his reemployment, without discriminating against him because of his union or concerted activities.

WE WILL NOT interfere with the formation or administration of any labor organization or contribute financial or other support to it.

WE WILL NOT give effect to the agreement dated May 22, 1954 with District 50, United Mine Workers of America, or to any contract or agreement with that organization which may now be in force.

WE WILL reimburse all our employees, whose initiation fees and membership dues in District 50, United Mine Workers of America, have been checked off, for the amounts thus deducted from their wages.

WE WILL withhold all recognition from District 50, United Mine Workers of America, as representative of any of our employees for the purposes of collective bargaining unless and until said organization shall have been certified as such representative by the National Labor Relations Board.

All our employees are free to become, remain, or refrain from becoming members of any labor organization, except to the extent that this right may be affected by agreements in conformity with Section 8 (a) (3) of the National Labor Relations Act, as amended October 22, 1951.

BOWMAN TRANSPORTATION, INC.
(Employer)

Dated_____ By_____
(Representative) (Title)

Dated at Washington, D. C., this 26th day of November 1954.

ROBERT E. MULLIN
Trial Examiner

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704 BEFORE THE NATIONAL LABOR RELATIONS BOARD
Washington, D. C.

Case Nos. 10-CA-1950 and 10-CA-1985

(Title Omitted)

Exceptions of the Respondent Company—Filed January 14, 1955

Comes now Bowman Transporation, Inc., the Respondent in the above-styled cases and files these its Exceptions to the Intermediate Report and Recommended Order of Trial Examiner Robert E. Mullin, issued November 26, 1954.

1.

Respondent excepts to the Trial Examiner's finding of fact, (I.R., p. 3, l. 51 et seq.) that at the meeting held on the morning of November 22, 1954 Mr. Bowman mentioned the union and employee activities therein to any of the employees there assembled; such finding of the Trial Examiner being contrary to the weight of the evidence contained in the record when read and considered as a whole.

2.

Respondent excepts to the finding of fact of the Trial Examiner (I.R., p. 3, l. 17 et seq.) that the company president at the meeting held on the morning of November 22,
told another of his drivers, J. P. Jordan, that he was
705 trying to play both ends and the middle, and that he
does not have any friends as of now in the office; such finding being contrary to the weight of the evidence and the facts appearing in the record.

3.

The Respondent excepts to the finding of the Trial Examiner (I.R., p. 4, l. 5 et seq. and l. 57) that company

Vice-President Lockridge drove to the home of employee Jordan, initiated a conversation about the union and questioned him about where the meeting was to be held; the same being contrary to the weight of the evidence contained in the record when read and considered as a whole.

4.

Respondent excepts to the conclusion of the Trial Examiner (I.R., p. 4, l. 25 et seq.) that Bowman and Lockridge were engaged in unlawful surveillance of the employees' union activities and thereby violated Section 8 (a)(1) of the Act; the same being contrary to the weight of the evidence in the record. It is noted that the complaint charged, as did General Counsel's allegations, that these two officials of Respondent engaged in unlawful surveillance of the *employees' union meeting*, whereas the finding of the Trial Examiner is that such officers engaged in unlawful surveillance of the employees' *other activities*. The proof offered was entirely at variance with the charge that a union meeting was placed under surveillance. No amendment was made at the hearing in this regard and, therefore, the complaint, with which the evidence must conform, still alleges surveillance of the employees' *union meeting*. The testimony in the record completely fails to substantiate in any degree surveillance of an employees' union meeting and the Trial Examiner's finding does not conform to the proof or the charge.

706

5.

Respondent excepts to the finding of the Trial Examiner (I.R., p. 5, l. 21 et seq.) that Respondent offered no evidence that during the preceding two years any driver other than employee Lackey had been dispatched on the run from Gadsden to Decatur, Alabama; such finding being directly contrary to facts as appear in the record.

6.

Respondent excepts to the conclusion of the Trial Examiner (I.R., p. 5, l. 36 et seq.) that Bowman threatened

Lackey with loss of a previously granted preference as to his truck runs which would seriously affect his working conditions and his tenure of employment, and that such was coercive and violative of Sections 8 (a)(3) and (1) of the Act; such conclusion being contrary to the weight of the evidence contained in the record.

7.

Respondent excepts to the finding of the Trial Examiner (I.R., p. 6, l. 1 & 2 et seq.) that former employee Welch Gross credibly testified that no one ever asked him to prepare and file a report about this previous accident; such finding being contrary to the weight of the evidence in the record.

8.

Respondent excepts to the finding of the Trial Examiner (I.R., p. 7, l. 2 et seq.) that none of the Respondent's witnesses testified that the drivers were required to file a written report of an accident; the same being directly contrary to the only reasonable inference
707 which could be drawn from the testimony of all of Respondent's witnesses, and such finding is contrary to the weight of the evidence.

9.

Respondent excepts to the finding of the Trial Examiner (I.R., p. 7, l. 26, et seq.) that company officials were either unaware of particular infractions of the ten hour rule or that they placidly condoned the practice; the same being directly contrary to the great weight of evidence appearing in the record.

10.

Respondent excepts to the finding of the Trial Examiner (I.R., p. 8, l. 1 et seq.) that it was reasonable to conclude that Bowman saw former employee Gross on the day that he and Lockridge visited Burns Park; the same being contrary to the weight of the evidence appearing in the record.

11.

Respondent excepts to the conclusion of the Trial Examiner (I.R., p. 8, l. 12 et seq.) that Mr. Bowman's testimony cannot be credited with respect to the reasons given by him for the discharge of former employee Gross; such conclusion being contrary to the great weight of testimony which appears in the record.

12.

Respondent excepts to the conclusion of the Trial Examiner (I.R., p. 9, l. 18 et seq.) that the real cause for Gross' discharge was his interest in the Teamsters union; the same being a conclusion drawn by the Trial Examiner upon biased testimony of the employee involved and is contrary to the great weight of testimony appear-
708 ing in the record and any reasonable inference which could be drawn therefrom.

13.

Respondent excepts to the conclusion of the Trial Examiner (I.R., p. 9, l. 47 et seq.) that Gross was not disqualified for reinstatement because of his alleged activities on the Teamsters' picket line; the same being contrary to law, as interpreted by applicable Board and Court decisions, and contrary to all applicable equitable principles.

14.

Respondent excepts to the conclusion of the Trial Examiner (I.R., p. 9, l. 54 et seq.) that the alleged interrogation of Jordan and Blackburn by Lockridge and Bowman constituted independent violations of Section 8(a)(1) of the Act; the "finding" of such conclusion being contrary to the great weight of the evidence, and the "violation" finding placed on such conclusion being contrary to law as interpreted by controlling Board and Court decisions.

15.

Respondent excepts to the finding of the Trial Examiner (I.R., p. 10, l. 55 et seq.) that employee Wilson enjoyed a "somewhat different status from that of the other

drivers", since he was a brother-in-law of Bowman; the same being directly contrary to all applicable testimony appearing in the record, and amounting only to an unwarranted presumption indulged in by the Trial Examiner.

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16.

Respondent excepts to the finding of the Trial Examiner (I.R., p. 10, l. 50 et seq.) that a number of employees questioned Bowman about the type of contract they could anticipate while *at the same time* authorization cards were being distributed among the employees; the same being directly contrary to all applicable testimony appearing in the record, and amounting in effect to a direct distortion of all facts as appear in the record.

17.

Respondent excepts to the statement of the Trial Examiner (I.R., p. 11, l. 6, et seq.) that Bowman told an employee he would advance their union dues to them from their next week's pay check; inasmuch as the record conclusively shows that union dues and initiation fees were forwarded to the union *only* as they were deducted from the employees' pay. There is no evidence appearing in the record that Bowman *advanced* money to the employees or to the union for such dues or initiation fees.

18.

Respondent excepts to the prejudicial inference created by the Trial Examiner (I.R., p. 11, l. 17 et seq.) that Bowman suggested on his own initiative that the union meeting be held at the terminal, inasmuch as the record shows that the suggestion was prompted by Regional Director Hollifield's statement he would probably have to arrange such a meeting with the employees in down town Gadsden.

19.

Respondent excepts to the conclusions of the Trial Examiner (I.R., p. 12, l. 38 et seq.) that Respondent
710 rendered illegal support and assistance to District 50 and interfered with the free choice of employees

to join or not join a labor organization; the same being contrary to the overwhelming weight of credible testimony appearing in the record.

20.

Respondent excepts to the recommendation of the Trial Examiner (I.R., p. 13, l. 7 et seq.) that Respondent should offer Gross, upon his application, reinstatement to his former or equivalent position; the same being a gross injustice and intolerable burden placed upon Respondent, cannot be supported by the weight of the evidence, and is contrary to law. On the same grounds, Respondent also excepts to the recommendation that Respondent make Gross whole for any loss of pay which he would normally have earned as wages,

1. From the time of his discharge until he went on strike (this was almost immediately) and

2. From the date of his application to return to work (Gross has made no such application) until the date of Respondent's offer of reinstatement.

21.

Respondent excepts to the recommendation of the Trial Examiner (I.R., p. 18, l. 23 et seq.) that upon the return to work of Joe Lackey the Respondent should not discriminate against him regarding his future assignments, inasmuch as the record shows that such would require the Respondent to continue in effect a situation regarding his work assignments which was obviously recognized at the hearing to have been only a temporary assignment. The enforcement of such a recommendation, instead of requiring nondiscrimination, would require a direct preference for such employee.

711

22.

Respondent excepts to the recommendation of the Trial Examiner (I.R., p. 13, l. 33 et seq.) that Respondent withhold recognition of District 50 and refrain from dealing with it unless and until it had been certified by the Board;

such recommendation would place an intolerable burden upon the respondent and in effect leave it confronted with the insatiable demands of two unions instead of only one, the present situation.

23

Respondent most vigorously excepts to the recommendation of the Trial Examiner (I.R., p. 14, l. 10 et seq.) that Respondent reimburse each employee for the amount of fees and dues which the company has checked off his wages and paid over to District 50; the same placing an unjust, inequitable and intolerable burden upon the Respondent. Such recommendation completely ignores all credible testimony in the record, is unlawful, grossly exceeds the punitive authority contained in the Labor-Management Relations Act, and is contrary to all sense of equity and justice.

24.

Respondent excepts to the finding of the Trial Examiner (I.R., p. 14, l. 23 et seq.) that the alleged unfair labor practices permitted in the past are related to other alleged unfair labor practices and that such may be anticipated in the future; such finding being inequitable, prejudicial, contrary to law and contrary to the weight of the evidence appearing in the record. Respondent excepts to the conclusions of law of the Trial Examiner (I.R., p. 14, l. 37 et seq.) that Respondent engaged in unfair labor practices with respect to the hire and tenure of em-
712 ployment of Welch Gross and Joe Lackey in violation of Section 8 (a)(3) of the Act; the same being contrary to the great weight of the evidence appearing in the record, and applicable Board and Court Decisions.

25.

Respondent excepts to the conclusions of law of the Trial Examiner (I.R., p. 14, l. 4, et seq.) that the Respondent interfered with the administration of District 50, contributed support to it, and thereby engaged in unfair labor

practices within the meaning of Section 8 (a)(2) of the Act; the same being contrary to the great weight of evidence appearing in the record.

26.

Respondent excepts to the conclusion of law of the Trial Examiner (T.R., p. 14, l. 45 et seq.) that the Respondent has interfered with, restrained, and coerced his employees in the exercise of rights guaranteed in Section 7 of the Act; such conclusion being without foundation in the record, contrary to law, and contrary to the concrete decisions of the National Labor Relations Board and Courts.

WHEREFORE, the Respondent prays that the Intermediate Report insofar as it pertains to the above exceptions be reversed and that the Board find that the Respondent in fact and in law has not engaged in any acts violative
713 of Section 8 (a)(3), Section (a)(2) and Section 8 (a)(1) of the Act.

This the 14th day of January, 1955.

Respectfully submitted,

Maurice F. Bishop
Attorney for Respondent

327 Frank Nelson Bldg.
Birmingham, Alabama

Alexander E. Wilson, Jr.
Attorney for Respondent

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Attorney for Respondent

Wilson, Branch and Smith
615 Rhodes Haverty Bldg.
Atlanta 3, Georgia

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BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case Nos. 10-CA-1956 and 10-CA-1985

BOWMAN TRANSPORTATION, INC.

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, A.F.L., LOCAL UNION No. 612

Decision and Order—Filed April 22, 1955

On November 26, 1954, Trial Examiner Robert E. Mallin issued his Intermediate Report in the above-entitled proceedings, finding that the Respondent had engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondent filed exceptions to the Intermediate Report and a supporting brief.

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and brief of the Respondent, and the entire record in these cases, and hereby adopts the findings,[1] conclusions, and recommendations of the Trial Examiner, with the following additions and modifications.

715 1. The Trial Examiner found that employee Welch Gross did not disqualify himself for reinstatement by his conduct while picketing the Respondent's terminal in Gadsden, Alabama. The Respondent urges that the

[1] The Trial Examiner found, and we agree, that the Respondent's interrogation of Jordan and Blackburn as to the Union Meeting, and its surveillance of this meeting, constituted independent violations of Section 8 (a)(1) of the Act. However, the Trial Examiner failed to effectuate these findings by appropriate remedial recommendations. Accordingly, in fashioning a remedy in these proceedings, we shall order that the Respondent cease and desist from interrogating its employees concerning union activities or from engaging in surveillance of such union activities.

Board's decision in *B.V.D. Company, Inc.*,[2] is determinative of its contention that Gross should be denied reinstatement because of his picket line activity.

On the state of the record before us, we are not convinced that sufficient evidence exists regarding any alleged acts of misconduct by Gross which would warrant denial of reinstatement to him, nor are we persuaded that the facts established herein are comparable to those appearing in the *B.V.D.* case. Accordingly, we adopt the Trial Examiner's recommendation that the Respondent offer to Gross, upon his application, reinstatement to his former or substantially equivalent position.

2. We concur in the Trial Examiner's finding that the Respondent rendered illegal support and assistance to District 50, United Mineworkers of America, and thereby violated Section 8(a)(2) and 8(a)(1) of the Act, and we adopt his recommendations based thereon. However, we do not adopt that portion of the Trial Examiner's recommended order which directs the Respondent to reimburse its employees for the amount of fees and dues which the Respondent checked off their wages and paid over to District 50. There is no evidence in the record that the Respondent enforced an involuntary checkoff or otherwise coerced its employees into paying these dues and fees. We therefore shall not order reimbursement to the employees of the dues and fees thus checked off.[3]

ORDER

Upon the basis of the entire record in these cases, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Bowman Transportation, Inc., Gadsden, Alabama, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Help-

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[2] 110 NLRB No. 206. Members *Murdock* and *Peterson* dissented in this case.

[3] See *Peerless Quarries Inc.*, 92 NLRB 1194.

ers of America, AFL, Local No. 612, or any other labor organization of its employees, by discharging or refusing to reinstate any of its employees or by discriminating in any other manner in regard to their hire or tenure of employment, or any term or condition of their employment;

(b) Assisting in the administration of District 50, United Mine Workers of America, or contributing support to it, or to any other labor organization;

(c) Giving effect to the collective bargaining agreement, dated May 22, 1954, between the Respondent and District 50, United Mine Workers of America, or to any extension, renewal or modification thereof, or any other contract agreement between the Respondent and the said labor organization which may now be in force;

(d) Recognizing District 50, United Mine Workers of America, as the representative of its employees for the purpose of dealing with the Respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until the said labor organization shall have been certified as such representative by the Board;

(e) Interrogating its employees concerning their activities on behalf of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, Local No. 612, or any other labor organization in a manner constituting interference, restraint, or coercion in violation of Section 8 (a) (1); and from engaging in the surveillance of its employees at such meetings; and

(f) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL,
716 Local No. 612, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as

a condition of employment, as authorized in Section 8 (a) (3) of the Act.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Offer to Welch Gross, upon his application, immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of pay he may have suffered by reason of the Respondent's discrimination against him, in the manner set forth in the section of the Intermediate Report entitled "The remedy;"

(b) Offer assignments to Joe Lackey, upon his reemployment, without discrimination because of that employee's union or concerted activities;

(c) Withdraw and withhold all recognition from District 50, United Mine Workers of America, as representative of its employees for the purpose of dealing with the Respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until the said labor organization shall have been certified as such representative by the Board;

(d) Post at all its terminals copies of the notice attached hereto and marked Appendix A.[4] Copies of
717 said notice, to be furnished by the Regional Director for the Tenth Region, shall, after being duly signed by the Respondent, be posted by it immediately upon receipt thereof, and maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material;

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[4] In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "PURSUANT TO A DECISION AND ORDER" the words "PURSUANT TO A DECREE OF THE UNITED STATES COURT OF APPEALS, ENFORCING AN ORDER."

(e) Notify the Regional Director, in writing, within ten (10) days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated, Washington, D. C., April 22, 1955.

ABE MURDOCK, Member
IVAR H. PETERSON, Member
PHILIP RAY RODGERS, Member
NATIONAL LABOR RELATIONS BOARD.

(SEAL)

APPENDIX A TO DECISION AND ORDER

NOTICE TO ALL EMPLOYEES

PURSUANT TO

DECISION AND ORDER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

WE WILL NOT discourage membership in INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL NO. 612, AFL, or in any other labor organization of our employees, by discharging or refusing to reinstate any
718 of our employees, or in any other manner discriminating in regard to their hire or tenure of employment, or any term or condition of their employment.

WE WILL offer to Welch Gross, upon his application, immediate and full reinstatement to his former or substantially equivalent position, without prejudice to any seniority or other rights and privileges previously enjoyed, and make him whole for any loss of pay suffered as result of the discrimination against him.

WE WILL offer assignments to Joe Lackey, upon his reemployment, without discriminating against him because of his union or concerted activities.

WE WILL NOT interrogate our employees concerning their activities on behalf of INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL, LOCAL NO. 612, or any other

labor organization in a manner constituting interference, restraint or coercion in violation of Section 8 (a) (1) of the Act, and we will not engage in the surveillance of our employees at such meetings.

WE WILL NOT interfere with the formation or administration of any labor organization or contribute financial or other support to it.

WE WILL NOT give effect to the agreement dated May 22, 1954 with DISTRICT 50, UNITED MINE WORKERS OF AMERICA, or to any contract or agreement with that organization which may now be in force.

WE WILL withhold all recognition from DISTRICT 50, UNITED MINE WORKERS OF AMERICA, as representative of any of our employees for the purposes of collective bargaining unless and until said organization shall have been certified as such representative by the National Labor Relations Board.

All our employees are free to become, remain, or refrain from becoming members of any labor organization,
719 except to the extent that this right may be affected by agreements in conformity with Section 8(a)(3) of the National Labor Relations Act, as amended October 22, 1951.

BOWMAN TRANSPORTATION, INC.
(Employer)

Dated ..... By .....
(Representative) (Title)

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725 112 NLRB No. 55 D-9119
Gadsden, Alabama

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case Nos. 10-CA-1950, 10-CA-1985

(Title Omitted)

Application to Modify Board Order and Supporting Argument

Now comes District 50, United Mine Workers of America, and does respectfully make application to the National

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

Labor Relations Board to modify the order made by it in the above styled cases on April 22, 1955, in the following separate and several particulars:

1. To delete and strike from said order Paragraph 1(c) thereof reading as follows:

"Giving effect to the collective bargaining agreement, dated May 22, 1954, between the Respondent and District 50, United Mine Workers of America, or to any extension, renewal or modification thereof, or any other contract agreement between the Respondent and the said labor organization which may now be in force."

2. To delete and strike from said order Paragraph 1(d) thereof reading as follows:

"Recognizing District 50, United Mine Workers of America, as the representative of its employees for the purpose of dealing with the Respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until
726 the said labor organization shall have been certified as such representative by the Board."

3. To delete and strike from said order Paragraph 2(c) thereof reading as follows:

"Withdraw and withhold all recognition from District 50, United Mine Workers of America, as representative of its employees for the purpose of dealing with the Respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until the said labor organization shall have been certified as such representative by the Board."

In support of this application, as to each of said paragraphs, separately and severally, District 50, United Mine Workers of America submits the following facts:

1. It is a union of national scope and is a labor organization within the meaning of Section 2(5) of the Labor Management Relations Act of 1947.

2. District 50, United Mine Workers of America, has not complied with the provisions of Section 9 of the Labor Management Relations Act of 1947.

In further support of said application for modification, as to each of said paragraphs, separately and severally, this applicant submits the following brief and argument:

1. Said paragraph of said order is unlawful.

2. Said order as set up in said paragraph is beyond the power of the National Labor Relations Board.

3. Said paragraph of said order imposes a barrier to any and all contracts, however made, between this applicant as the representative of the employees of the respondent employer and said employer.

4. Said paragraph of said order is a ban in perpetuity against contracts between this applicant and the employer named as respondent in said cases.

727 5. There is no federal law which requires that District 50, United Mine Workers of America, be first certified by the National Labor Relations Board as the representative of employees before it has the legal right to deal with the employer concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment.

6. Under the applicable provisions of law, a labor union which represents the majority of the employees of an employer is authorized to act as the representative of such employees for the purpose of dealing with the employer concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment and is not obligated as a condition precedent to be first certified as such representative by the National Labor Relations Board.

7. Said paragraph seeks to set up a limitation of certification by the National Labor Relations Board as a condition precedent to the right of District 50, United Mine Workers of America, to represent the majority of the employees of the employer respondent in said cases.

8. The right of District 50, United Mine Workers of America, to act as representative of the majority of the employees of the respondent employer in said cases cannot legally be cut off unless and until District 50, United Mine Workers of America shall have been certified by the National Labor Relations Board as the representative of those employees for the purpose of dealing with the employer concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment.

9. Said paragraph operates as an absolute prohibition in perpetuity against the right of District 50, United Mine Workers of America, to act as representative of the
728 majority of the employees of the present employer named as respondent in said cases, and for that reason is unlawful and unconstitutional.

10. Said paragraph of said order imposes a penalty for non-compliance with the provisions of Section 9 of the Labor Management Relations Act greater than that imposed by law.

11. Said paragraph of said order is, in effect, administrative legislation contrary to law.

Respectfully submitted,

CRAMPTON HARRIS,
Attorney for District 50,
United Mine Workers of America.

Address of Crampton Harris:
1018-19 First National Building,
Birmingham 3, Alabama.

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730 113 NLRB No. 83 D-9359

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Cases Nos. 10-CA-1950, 10-CA-1985

BOWMAN TRANSPORTATION, INC.

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL, LOCAL NO. 612

Supplemental Decision and Order—Filed August 17, 1955

On April 22, 1955, the Board issued a Decision and Order in the above-entitled proceedings, finding, *inter alia*, that the Respondent (1) violated Section 8(a)(3) of the Act by discriminatorily discharging Welch Gross, and (2) violated Section 8(a)(2) of the Act by illegally assisting District 50, United Mine Workers of America, herein called the UMW, a labor organization not in compliance with the Provisions

of Section 9(f), (g) and (h) of the Act. To effectuate the finding of discrimination, the Board ordered the Respondent to reinstate Gross, upon application, to his former or substantially equivalent position. To remedy the effect of the illegal assistance to the UMW, the Board ordered the Respondent to cease giving effect to its contract with the UMW and to withdraw and withhold recognition from the UMW unless and until the UMW shall have been certified by the Board as the exclusive bargaining representative of the Respondent's employees.

On April 29, 1955, the Respondent filed with the Board a Motion for Reconsideration of the Board's Decision and Order. In its Motion, the Respondent urged that Welch Gross be denied reinstatement because of his par-
731 ticipation in certain alleged misconduct during the course of a strike against the Respondent. On May 11, 1955, the UMW filed an Application to Modify Board Order and Supporting Argument, in which it requested that the Board amend its Order by striking therefrom paragraphs 1(c), 1(d), and 2(c), said paragraphs relating to the direction that the Respondent cease giving effect to its contract with the UMW and that the respondent withdraw and withhold all recognition from the UMW unless and until said labor organization has been certified by the Board. For the reasons set forth below, the Respondent's Motion for Reconsideration and the UMW's Application to Modify Board Order are denied.

A. *Respondent's Motion for Reconsideration.* The Respondent contends in its Motion that Gross participated in picket line misconduct which disqualified him for reinstatement, and further, that Gross should be denied reinstatement because he engaged in an unlawful secondary boycott of Respondent's customers. Similar contentions were made by the Respondent in its exceptions to the Intermediate Report and supporting brief.

The Board, having duly considered the Respondent's Motion for Reconsideration of its decision ordering Gross' reinstatement, the Motion is denied on the ground that it raises no issues not previously considered by the Board.

B. *UMW's Application to Modify Board Order.* In its Application, the UMW urges that the Board's remedial Order, directing the Respondent to cease and desist from

recognizing the UMW unless and until it was certified, is unlawful because the Board has no power under the Act to require that a labor organization participate in a Board election before it may represent an employer's em-
732 ployees, and because the Order penalizes the UMW for its noncompliance with Section 9(f), (g) and (h) of the Act.

The UMW, although duly apprised that the General Counsel alleged in his complaint that it had been unlawfully assisted by the Respondent, did not file exceptions to the trial Examiner's finding of such assistance or to his recommendation that the Respondent withdraw and withhold recognition from the UMW unless and until it obtained a Board certification. Under the circumstances, we conclude that the Application to Modify Board Order raises issues which should have been urged as exceptions to the Intermediate Report and that its filing is therefore untimely.[1]

However, aside from the Application's untimeliness, we are persuaded that the contentions raised in the UMW's moving papers lack merit. With respect to the Board's power to issue the type of order here under attack, Section 10(c) of the Act authorizes the Board, when it finds that an unfair labor practice has been committed, "to cause to be served on such person [committing the unfair labor practice] an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action . . . as will effectuate the policies of the Act." Pursuant to this Congressional mandate, the Board has, since its earliest days, recognized that the policies of the Act could best be effectuated in cases involving violations of Section 8(a)(2) by directing the offending employers to withhold the preferred treatment afforded to the labor organizations involved until the effect of the unfair labor practices had been dissipated and the majority
733 status of such unions had been established in an atmosphere free of restraint and coercion.

In the case of a dominated labor organization, the Board normally orders the complete disestablishment of such

[1] Section 102.46 of Board Rules and Regulations provides that any party to a complaint proceeding may, within 20 days from the date of service of the order transferring the case to the Board, file with the Board exceptions to the Trial Examiner's Intermediate Report and Recommended Order.

organization with the result that a dominated union can never be certified by the Board.[2] Such orders have successfully withstood challenge before the Supreme Court which has approved their issuance on the ground that they constituted a valid exercise of the Board's remedial powers under Section 10(c) of the Act.[3] However, in the case of an assisted but undominated labor organization, the Board has required the offending employer to withdraw and withhold recognition from the assisted union until it was certified, thus enabling the Board to assure the affected employees that their statutory right to freely choose a bargaining representative shall be preserved by conducting an election under conditions which will render such a choice possible.

It would seem clear, on the basis of the foregoing, that if this Board possesses the power under Section 10(c) of the Act to dissipate the effect of an unfair labor practice by *completely removing* a dominated union as bargaining representative of the offending employer's employees, as the Supreme Court has held, the Board manifestly has the statutory power to impose the lesser sanction of certification in the case of an assisted union in order to effectuate the policies of the Act.

In its Decision and Order, the Board concluded that the Respondent had unlawfully accorded the UMW the status of exclusive bargaining representative for its employees.
734 The right to such an exclusive status derives solely from the Act which we administer.[4] To remedy the unfair labor practice here committed, the Board is under a statutory duty to insure that that status is acquired free from any assistance by the Respondent. Section 9(c) of the Act, embodying the election procedures established by Congress for determining the exclusive majority representation rights of labor organizations, affords the channel

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[2] See *The Carpenter Steel Company*, 76 NLRB 670, 671; *Matter of Pennsylvania Greyhound Lines, Inc.*, 1 NLRB 1, enf'd 303 U. S. 261.

[3] See *N. L. R. B.* v. *Pennsylvania Greyhound Lines, Inc.*, note 2 *supra*; *N. L. R. B.* v. *Newport News Shipbuilding & Drydock Co.*, 308 U. S. 241.

[4] See *National Maritime Union of America* v. *Herzog*, 78 F. Supp. 146, 156 (D. C. D. C.), aff'd per curiam 334 U. S. 854:

> "That extraordinary privilege [of exclusive representative status] is extended by statute and except for the Act employers are not under compulsion to bargain collectively."

through which that remedy can be effected. By its Order, the Board is merely directing that the UMW, like any other assisted union, demonstrate that its right to be the exclusive representative of the employees involved has been established in an atmosphere free of restraint and coercion.

The UMW also contends in its Application to Modify Board Order that the Order operates to penalize the UMW because of its noncompliance with the provisions of Section 9(f), (g) and (h) of the Act. Apparently inherent in this contention is the argument that, as the UMW did not invoke the Board's processes in these proceedings, the Board is compounding the sanctions of those provisions by involving the UMW in these cases and requiring certification as a condition of achieving representative status, a condition which it cannot fulfill unless it comes into compliance.

Any "penalty" which the UMW conceives has been imposed upon it because of its inability to achieve certification stems, not from any action by this Board, but from the UMW's wilful refusal to comply with the provisions of Section 9(f), (g) and (h). Congress imported those provisions into the Act, which require that labor
735 organizations and their officers file various financial and organizational reports and non-Communist affidavits, because it believed that "the public, and particularly the employees in a bargaining unit called on to ballot concerning the choice of a bargaining agent, have a substantial interest in knowing pertinent facts concerning the organization which seeks the statutory privilege of being the exclusive bargaining representative."[5] The UMW has chosen not to make those "pertinent facts" public, but nevertheless desires the exclusive representation rights at the Respondent's terminals. In answer to a similar contention raised in *National Maritime Union of America* v. *Herzog*,[6] the Court stated:

> The argument of the plaintiff [union], which we have summarized above, concedes that Congress had the right to require the reports called for by Section 9(f) but asserts that it had no right to withhold from

[5] *Ibid.*, at p. 155.

[6] *Ibid.*, at p. 158.

a union which refused to file them, the privilege conferred by the same statute of being chosen as exclusive bargaining agent. The 'results that flow' from so doing will be virtual destruction of the union, plaintiff says. Those results flow, not from the operation of the statute, but from the plaintiff's willful refusal to furnish information which they admit is constitutionally required. If the plaintiff Union suffers the loss of a chance to be chosen as exclusive bargaining agent because of its failure to file the reports exacted by Section 9(f), the injury is the result of its own choice in deciding not to file the statements which it admits are constitutionally required.

In sum, the UMW is here suggesting that the Board do for the UMW what it would not do for a complying union found to have been illegally assisted. The very nature
736 of the 8(a)(2) violation imports into the Board processes the labor organizations which are so assisted; and the orders of the Board, directed as they are against offending employers, necessarily involve those labor organizations. Where a noncomplying union happens to be the assisted union in such proceeding, there appears to be no justifiable reason for extending preferred treatment to it over complying labor organizations by eliminating the certification requirement in the Board's orders. To do so would negative the policy and intent of Section 9(f), (g) and (h) of the Act.

ORDER

IT IS HEREBY ORDERED that the Respondent's Motion for Reconsideration be, and it hereby is, denied.

IT IS HEREBY FURTHER ORDERED that the Application for Modification of Board Order filed by the United Mine Workers of America be, and it hereby is, denied.

Dated, Washington, D. C., August 17, 1955.

GUY FARMER, Chairman
ABE MURDOCK, Member
IVAR H. PETERSON, Member
PHILIP RAY RODGERS, Member
BOYD LEEDOM, Member
NATIONAL LABOR RELATIONS BOARD

(SEAL)

739 (File Endorsement Omitted)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,887

DISTRICT 50, UNITED MINE WORKERS OF AMERICA, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

Petition for Review of Order of
National Labor Relations Board

No. 12,950

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

BOWMAN TRANSPORTATION, INC., *Respondent*.

Petition for Enforcement of an Order of the
National Labor Relations Board

Mr. E. Crampton Harris, with whom *Messrs. Yelverton Cowherd* and *Alfred D. Treherne* were on the brief, for petitioner in No. 12,887.

Mr. Frederick U. Reel, Attorney, National Labor Relations Board, of the bar of the Supreme Court of Wisconsin, *pro hac vice*, by special leave of Court, with whom *Messrs. Theophil C. Kaminholz*, General Counsel, National Labor Relations Board, *David P. Findling*, Associate General Counsel, National Labor Relations
740 Board, and *Marcel Mallet-Prevost*, Assistant General Counsel, National Labor Relations Board, and *Mrs. Nancy M. Sherman*, Attorney, National Labor Relations Board, were on the brief, for respondent in No. 12,887 and petitioner in No. 12,950. *Mr. Robert G. Johnson*, Attorney, National Labor Relations Board, also entered an appearance for respondent in No. 12,887 and petitioner in No. 12950.

No appearance for respondent in No. 12,950.

OPINION — OCTOBER 4, 1956

Before PRETTYMAN, WILBUR K. MILLER and WASHINGTON, Circuit Judges.

WILBUR K. MILLER, *Circuit Judge:* The National Labor Relations Board petitions for enforcement of its order which requires Bowman Transportation, Inc., an interstate trucking company, to cease and desist from certain unfair labor practices, and to redress them by taking the prescribed affirmative action. Bowman Transportation has not complained of the order and did not appear here. But District 50, United Mine Workers of America, which had been chosen by the Bowman employees as their exclusive bargaining representative but has not been certified as such by the Board, petitions us to review and set aside three paragraphs of the order by which it feels aggrieved.

The background of the Labor Board's order and its essential features may be quickly sketched. In November, 1953, the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, Local No. 612, undertook to organize Bowman's employees and established a picket line at its main terminal in Gadsden, Alabama. The Teamsters' efforts, opposed by the company, were unsuccessful but were still in progress, at least to the extent of the picketing which a state court first enjoined but later permitted, with violence and disorder forbidden, when another labor organization appeared on the scene in May, 1954.

741 The president of Bowman called a meeting of all employees for May 22, after having been told by some employees they wanted a contract, and after having conferred with organizers for District 50. The meeting was largely attended. Those present voted unanimously to be represented by District 50 and most of them signed authorization cards, whereupon Bowman recognized that union as the bargaining representative and entered into a contract with it.

Because of these events, the General Counsel of the Labor Board charged Bowman with several unfair labor practices. After a hearing the Board found: (1) that Bowman discriminatorily discharged driver Gross and

removed driver Lackey from his regular run because of their activities in behalf of Teamsters, thereby discouraging membership in that union, an unfair labor practice within the meaning of § 8(a)(3) of the Act; (2) that Bowman interfered with the administration of District 50 and contributed support to it and so engaged in unfair labor practices within the meaning of § 8(a)(2) of the Act; and (3) that Bowman interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in § 7 of the Act, and thereby engaged in unfair labor practices within the meaning of § 8(a)(1) of the Act.

Upon these findings, the Board ordered Bowman to cease and desist from: 1(a) the unfair labor practices found by it; 1(b) interfering with, restraining or coercing its employees in the exercise of their statutory rights; and from

> "[1](c) Giving effect to the collective bargaining agreement, dated May 22, 1954, between the Respondent and District 50, United Mine Workers of America, or to any extension, renewal or modification thereof, or any other contract agreement between the Respondent and the said labor organization which may now be in force;
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> 742 "[1](d) Recognizing District 50, United Mine Workers of America, as the representative of its employees for the purpose of dealing with the Respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until the said labor organization shall have been certified as such representative by the Board."

The portion of the order requiring affirmative action directed Bowman to offer reparations to drivers Gross and Lackey, and to

> [2](c) Withdraw and withhold all recognition from District 50, United Mine Workers of America, as representative of its employees for the purpose of dealing with the Respondent concerning grievances, labor disputes, wages, rates of pay, hours of em-

ployment, or other conditions of employment, unless and until the said labor organization shall have been certified as such representative by the Board."

The order also required Bowman to post prescribed notices.

May 11, 1955, before enforcement of the order had been sought, District 50, which had not theretofore been a party to the proceeding, filed with the Board an application to modify the order by striking therefrom paragraphs 1(c), 1(d) and 2(c), which we have reproduced above. The application was denied by the Board.

Part of the Background of the Board's order is the fact that the Teamsters union had theretofore filed the information and affidavits described in § 9(f), (g) and (h) of the Labor Management Relations Act, 1947, while United Mine Workers of America, the parent union of District 50, has not filed thereunder. Teamsters was and is therefore eligible to be certified as the bargaining representative of Bowman's employees if it were chosen by them, but District 50, though chosen, may not be certified so long as its parent is in a state of non-compliance

734 That Bowman had engaged in the unfair labor practices found by the Board clearly appears from the evidence. It was appropriate to order, as the Board did, that the employer correct its discriminatory treatment of drivers Gross and Lackey, and that it cease and desist from giving effect to its contract with District 50, which was unfairly arrived at through Bowman's illegal assistance to that union. In those respects the order should be enforced.

This leaves for consideration paragraphs 1(d) and 2(c) of the order which direct Bowman to cease and desist from recognizing District 50 as the bargaining representative, and to withdraw and withhold such recognition, "unless and until the said labor organization shall have been certified as such representative by the Board." District 50's attack on these portions of the order raises the question whether the Labor Board has authority to forbid an employer to recognize or contract with a labor organization chosen by its employees as their exclusive

bargaining representative so long as the union remains uncertified as such.

We hold the Board does not have such authority. In *United Mine Workers of America* v. *Arkansas Oak Flooring Co.*, 351 U. S. 62, 71-2 (1956), the Supreme Court observed that there is no statutory provision to the effect that a non-complying union "may not represent an appropriate unit of employees if a majority of those employees give it authirity so to do." The Court went on to say:

> ". . . Likewise, there is no statement precluding their employer from voluntarily recognizing such a noncomplying union as their bargaining representative. Section 8(a)(5) declares it to be an unfair labor practice for an employer 'to refuse to bargain collectively with the representatives of his employees, *subject to the provisions of section 9(a).*' (Emphasis supplied.) Section 9(a), which deals expressly with employee representation, says nothing as to how the
> 744 employees' representative shall be chosen. See *Lebanon Steel Foundry* v. *Labor Board*, 76 U. S. App. D. C. 100, 103, 130 F. 2d 404, 407. It does not make it a condition that the representative shall have complied with § 9(f), (g) or (h), or shall be certified by the Board, or even be eligible for such certification."

In footnote 8, 351 U. S. at 72, the Court noted that "A Board election is not the only method by which an employer may satisfy itself as to the union's majority status."

In a recent case somewhat similar to this one,[1] Chief Judge Parker of the Fourth Circuit discussed the *Oak Flooring* opinion and said:

> ". . . If a cease and desist order were proper under the circumstances of the case, it should have been couched in language which would not have precluded representation of the employees by District 50 if chosen by a majority to represent them after

[1] *District 50, United Mine Workers of America* v. *National Labor Relations Board and Pittsburgh Valve Co.* v. *National Labor Relations Board*, 234 F. (2d) 565, 571 (4th Cir. 1956).

all effects of any unfair labor practice had been eliminated."

We adopt the language just quoted as applicable to this case. Paragraphs 1(d) and 2(c) are therefore improper and should not be enforced in their present form, since they preclude District 50 from representing the employees in the future, even though hereafter they should choose it in an atmosphere and a situation entirely free from the influence of unfair labor practices. There should be added, at the end of each of those paragraphs, the words "or shall have been freely chosen as such by a majority of the employees after all effects of unfair labor practices have been eliminated."

745 With paragraphs 1(d) and 2(c) amended in the manner indicated above, and with the slight changes in the notice to be posted by the company which will hereinafter be suggested, we think the order will achieve the Board's proper objective, which is to eliminate the effects of Bowman's unfair labor practices so as to place Teamsters, District 50, employer and employees *in statu quo ante*, and to forbid and guard against future unfair practices by the employer, so that thereafter the employees and any and all unions concerned may work out the representation problem, untrammeled by any outside influence. When this objective has been reached, and if the employees then want a bargaining representative, they will be in a position to choose one in any manner which clearly indicates their desire. They may select non-complying District 50, or complying Teamsters, or any other complying or non-complying union, and the employer must recognize their choice. The only limitation is that, if the Board conducts an election, District 50 will not be on the ballot. Amended in the manner we have indicated, the order will be enforced.

There still remains, however, the necessity of deciding when the ill effects of Bowman's past practices have been removed. Certainly, one effect of Bowman's unfair labor practices is removed by requiring the offer of reparation to the two drivers. Another is eliminated by striking down the present contract, unfairly arrived at, between Bowman and District 50. The possibility of

continuing effect is guarded against by ordering Bowman (1) to cease and desist from the labor practices found to be unfair; (2) to refrain in the future from engaging in those or any other unfair practices; and (3) to post notices for 60 days that, in obedience to the Board's order, it will make the required amends and will not in the future interfere in any way with the organizational efforts of any union, or with the employees' exercise of the rights guaranteed to them by law.

746 We think that, 60 days after the notices have been posted, it may reasonably and safely be assumed that normalcy has been restored by the Board's corrective order. Thereafter, if a Board election should be required and if the employees should therein select Teamsters or some other complying union as bargaining representative, the matter would be at an end. But, if in an election the employees should reject any and all candidates, or if no election is held, and if the employees should designate District 50 as their choice, that union will become the bargaining representative.

The form of notice to be posted by the company should be modified so as not to be inconsistent with this opinion. Moreover, the notice should not indicate that the Board prefers Teamsters. We suggest that references to that union in the Board's form of notice are susceptible of being construed as so indicating, and might better be omitted so that the company's pledges of non-interference will apply to all labor organizations. We attach as an appendix what we regard as a proper notice.

The order under review will be amended in the manner set forth in the foregoing opinion. As so amended, the order will be enforced.

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO A DECREE

of the Unted States Court of Appeals for the District of Columbia Circuit, enforcing an order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

747 WE WILL NOT discourage membership in any labor organization of our employees, by discharging or refusing to reinstate any of our employees, or in any other manner discriminating in regard to their hire or tenure of employment, or any term or condition thereof, because of their activity in behalf of or membership in such labor organization.

WE WILL offer to Welch Gross, upon his application, immediate and full reinstatement in his former position or in one substantially equivalent, without prejudice to any seniority or other rights and privileges he previously had, with back pay from the date of his discharge to the date of his reinstatement.

WE WILL offer assignments to Joe Lackey, upon his re-employment, the equivalent to those he had before he was removed from his regular run.

WE WILL NOT interrogate our employees concerning their activities in behalf of any labor organization in a manner which constitutes interference, restraint or coercion in violation of § 8(a)(1) of the Act, and we will not engage in surveillance of our employees at labor organization meetings.

WE WILL NOT interfere with the formation or administration of any labor organization or contribute financial or other support to any such organization.

WE WILL NOT give effect to our agreement, dated May 22, 1954, with District 50, United Mine Workers of America, or to any other contract or agreement with District 50 which may now be in force, since the National Labor Relations Board has

held that the contract was brought about through unfair labor practices.

WE WILL NOT recognize District 50 as the bargaining representative of our employees, unless and until it shall have been certified as such representa-
748 tive by the National Labor Relations Board, or shall have been selected as such by a majority of our employees at a time at least 60 days later than the date of this notice.

All our employees are free to become, remain, or refrain from becoming, members of any labor organization, except to the extent that this right may be affected by agreements made in conformity with § 8(a)(3) of the National Labor Relations Act, as amended.

BOWMAN TRANSPORTATION, INC.
(Employer)

Dated ..... By .....
(Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

WASHINGTON, *Circuit Judge*, dissenting: I am constrained to disagree with the court's action in modifying the Board's order.

1. Section 10(c) of the Labor Management Relations Act of 1947, 29 U.S.C. § 160(c) (1952), authorizes the Board, when it finds that an unfair labor practice has been committed, to "cause to be served on such person [committing the unfair labor practice] an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action . . . as will effectuate the policies of this subchapter."[1] These policies include, among others, the elimination of unfair labor practices by employers and unions, and the protection of the employees' right to designate a bargaining

[1] The subchapter referred to is that titled "National Labor Relations," which deals generally with the Labor Board, its powers, procedures, and jurisdiction.

749 representative of their own choosing, as expressed in Section 9(a) of the Act.

It seems quite clear that a provision prohibiting an employer from recognizing a union unfairly controlled or supported by the employer until that union has been certified as the bargaining agent of the employees would in many cases be an important factor in purging unfair labor practices. In remedying such practices the Board has long inserted a provision of that sort in its orders. Even stronger action has sometimes been taken by the Board, and the Supreme Court has supported it. For example, employer-dominated unions have on occasion been ordered completely disestablished, with Supreme Court approval. *National Labor Relations Board* v. *Falk Corp.*, 308 U.S. 453 (1940); *H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U.S. 514 (1941); *Labor Board* v. *Link-Belt Co.*, 311 U.S. 584 (1941). And in a case where the employer had assisted union A, the Board ordered him to deal exclusively with union B (a rival), even though before the order was issued the Board had been advised that a majority of the employees wished to be represented by the assisted union. The order was upheld. *International Association of Machinists* v. *Labor Board*, 311 U.S. 72 (1940). In view of these precedents, the Board may surely take a less stringent course, and in an appropriate case order non-recognition by the employer of the assisted union as long as it remains uncertified. As to unions complying with the filing provisions of the Act, that conclusion would seem beyond question. As Chief Judge Parker said in *District 50, United Mine Workers* v. *National Labor Relations Board*, 234 F.2d 565 (4th Cir. 1956):

> "... the form of order here entered [similar to that in the instant case] would be appropriate if applied to a union which had complied with the filing provisions of the Labor Management Relations Act ...."

750 The question here, of course, is whether the fact that a union has not complied with the filing provisions of the Act, and refuses to comply, entitles it to special treatment by the Board. The Ninth Circuit has answered

this question in the negative.[2] Yet the decision of the majority here, and of the Fourth Circuit in the *District 50* case, is to the contrary. The holding is—in substance and effect—that the Board cannot as a matter of law apply to a union which has not complied with the filing provisions of the law, the very condition which it could rightfully apply to a complying union. I find no basis in principle for giving a non-complying union an advantage which complying unions do not have. In practice to do so may encourage unions not to comply with the Act.

Mine Workers v. *Arkansas Oak Flooring Co.*, 351 U.S. 62 (1956), relied on by the majority, simply holds that noncompliance by a union with Section 9(f),(g), and (h) of the Act does not open the door to the state courts to take action against the union that they would not otherwise be able to take. As I read that decision, it was intended to preserve and protect the authority of the National Labor Relations Board, not to undermine and weaken it. It can hardly be interpreted as holding that noncompliance by a union prevents the National Labor Relations Board from taking action which it is authorized to take against a *complying* union, and which the Act itself permits. It is true that the Supreme Court's opinion declares that "no consequences other than those so
751 listed [in the Act] shall result from noncompliance."
351 U.S. at 73. But the context of this statement indicates that the Court was referring to consequences apart from those sanctioned by the Act itself. "Elimination of the Board [as a forum of resort by any union not complying with the filing provisions of the Act] does not, however, eliminate the applicability of the National Labor Relations Act, as amended . . . ." *Id.* at 74.

2. The principle is now well established that the Board, and not the courts, is primarily charged with the responsibility of determining what provisions are best included in Board orders to carry out the policies of the Act. "The particular means by which the effects of unfair

[2] See National Labor Relations Board v. Wemyss, 212 F.2d 465 (9th Cir. 1954), where the assisted union had not complied with Section 9(f), (g), or (h) (see p. 470), and where the court held that the assistance given warranted issuance of "an order that the employer withdraw recognition from the favored organization unless and until it is certified by the Board after a fair election." (p. 472)

labor practices are to be expunged are matters 'for the Board not the courts to determine' . . . We give considerable weight to that administrative determination. It should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Electric Co.* v. *Labor Board*, 319 U.S. 533, 539-40 (1943), citing *International Association of Machinists* v. *Labor Board*, 311 U.S. 72 at 82 (1940); *Labor Board* v. *Link-Belt Co.*, 311 U.S. 584 at 600 (1941). The majority has not suggested that the Board's order does not effectuate the policies of the Act or that it was not intended to do so. Nor, as I view the case, could such a conclusion fairly be reached.

Concededly, if District 50 or its parent organization persists in refusing to file the required statements and affidavits, the Board's order will effectually preclude the employer from recognizing and contracting with District 50 as the employees' bargaining agent, even though the employees continue to favor it. But this restraint on the employees' freedom of choice is in part due to the attitude of the union, which has chosen not to comply with Section 9. Furthermore, if the Board properly concludes

752 that certification of the union in the normal way is necessary to dissipate the effect of the unfair labor practices, the order would tend to assure—rather than deny—the freedom of choice guaranteed by the Act by removing improper restraints on the employees. See *International Association of Machinists* v. *Labor Board*, 311 U.S. at 82; *H. J. Heinz Co.* v. *Labor Board*, 311 U.S. at 522.

The Board stated here that the disputed provision of its order was included "To remedy the effect of the illegal assistance to the UMW," and further that:

> "By its Order, the Board is merely directing that the UMW, like any other assisted union, demonstrate that its right to be the exclusive representative of the employees involved has been established in an atmosphere free of restraint and coercion."

And with regard to its previous practice the Board stated:

> "However, in the case of an assisted but undominated labor organization, the Board has required the offending employer to withdraw and withhold recognition from the assisted union until it was certified, thus enabling the Board to assure the affected employees that their statutory right to freely choose a bargaining representative shall be preserved by conducting an election under conditions which will render such a choice possible."

It is true that the Board did not expressly consider any alternative remedies—such as conducting an investigation at a later time to determine whether the effects of the unfair labor practices had by then been dissipated. But District 50 suggested no such alternative: it simply argued to the Board that the order was beyond the Board's power. When this argument was rejected, it appealed to this court on the same ground. As I have indicated, I think that ground is clearly untenable: in a proper case, the Board has power to enter an order of the present sort. And I think that this is such a case,
and that the Board's findings were adequate to sup-
753 port its action—especially since it was never asked to consider any other type of action. But if this be doubted, *cf. Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608 (1946), the proper course for this court is to remand the case to the Board for further consideration. Certainly it is not within our province for us to rewrite the Board's order to choose a different remedy than it has chosen, and to direct that our new order be enforced. See *National Labor Relations Board* v. *Falk Corp.*, 308 U.S. 453 (1940); *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952).

755 (File Endorsement Omitted)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

OCTOBER TERM, 1956

No. 12,887

DISTRICT 50, UNITED MINE WORKERS OF AMERICA, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

No. 12,950

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

BOWMAN TRANSPORTATION, INC., *Respondent*.

On Petition for Review and on Petition for Enforcement of an Order of the National Labor Relations Board.

Before Prettyman, Wilbur K. Miller and Washington, Circuit Judges.

Order and Decree—Filed October 4, 1956

These cases came on to be heard on the record from the National Labor Relations Board and on a petition for review and a petition for enforcement of the order of the National Labor Relations Board herein, and were argued by counsel.

On consideration whereof, it is ORDERED and DECREED by the Court that the order of the Board on review herein be, and the same is hereby, modified as indicated in the opinion of this Court and, as so modified, will be enforced.

It is, therefore, ORDERED by the Court that the National Labor Relations Board shall within 10 days serve and file a proposed enforcement decree and form of notice conforming with the views set forth in the opinion of this Court.

The provisions of paragraph (e) of Rule 38 of this Court shall apply thereto.

Dated: October 4, 1956.

Per Circuit Judge Wilbur K. Miller.

Separate dissenting opinion by Circuit Judge Washington.

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756 (File Endorsement Omitted)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,887

DISTRICT 50, UNITED MINE WORKERS OF AMERICA, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

No. 12,950

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

BOWMAN TRANSPORTATION, INC., *Respondent*.

Decree Enforcing as Amended an Order of the National Labor Relations Board—Filed November 1, 1956

Before Prettyman, Wilbur K. Miller and Washington, Circuit Judges.

This cause came on to be heard upon the petition of District 50, United Mine Workers of America to review part of an order of the National Labor Relations Board dated April 22, 1955, and upon the petition of the National Labor Relations Board filed against Bowman Transportation, Inc. for enforcement of the order. The Court heard argument of respective counsel on April 9, 1956, and has considered the briefs and the transcript of record filed in this cause. On October 4, 1956, the Court, being fully advised in the premises, handed down its decision amending,

and as amended, enforcing the order of the Board. In conformity therewith, it is hereby

ORDERED, ADJUDGED AND DECREED by the Court that Bowman Transportation, Inc.; Gadsden, Alabama, its officers, agents, successors, and assigns, (hereinafter called the Company), shall:

1. Cease and desist from:

(a) Discouraging membership in International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, Local No. 612, or any other labor organization of its employees, by discharging or refusing to reinstate any of its employees or by discriminating in any other manner in regard to their hire or tenure of employment, or any term or condition of their employment.

757

(b) Assisting in the administration of District 50, United Mine Workers of America, or contributing support to it, or to any other labor organization.

(c) Giving effect to the collective bargaining agreement, dated May 22, 1954, between the Company and District 50, United Mine Workers of America, or to any extension, renewal, or modification thereof, or any other contract agreement between the Company and the said labor organization which may now be in force.

(d) Recognizing District 50, United Mine Workers of America, as the representative of its employees for the purpose of dealing with the Company concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until the said labor organization shall have been certified as such representative by the National Labor Relations Board or shall have been freely chosen as such by a majority of the employees after all effects of unfair labor practices have been eliminated.

(e) Interrogating its employees concerning their activities on behalf of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, Local No. 612, or any other labor organization, in a manner constituting interference, restraint, or coercion in

violation of Section 8 (a) (1), of the National Labor Relations Act, as amended (hereinafter called the Act), and from engaging in the surveillance of its employees at such meetings.

(f) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, 758 Local 612, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

2. Take the following affirmative action, which the Board has found will effectuate the policies of the Act:

(a) Offer to Welch Gross, upon his application, immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of pay he may have suffered by reason of the Company's discrimination against him, in the manner set forth in the section of the Intermediate Report of the Trial Examiner of the National Labor Relations Board dated November 26, 1954, entitled "The Remedy."

(b) Offer assignments to Joe Lackey, upon his reemployment, without discrimination because of that employee's union or concerted activities.

(c) Withdraw and withhold all recognition from District 50, United Mine Workers of America, as representative of its employees for the purpose of dealing with the Company concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment unless and until the said labor organization shall have been certified as such representative by the Board or shall have been freely chosen as such by a majority of

the employees after all effects of unfair labor practices have been eliminated.

(d) Post at all its terminals copies of the notice attached hereto and marked "Appendix A." Copies of said notice, to be furnished by the Regional Director for the Tenth Region of the National Labor Relations Board, Atlanta, Georgia, shall after being duly signed by the Company, be posted by it immediately upon receipt thereof, and
759 maintained by it for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Company to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the aforesaid Regional Director, in writing, within ten (10) days from the date of this Decree, what steps the Company has taken to comply herewith.

/s/ E. Barrett Prettyman
Judge, United States Court of Appeals
for the District of Columbia Circuit

/s/ Wilbur K. Miller
Judge, United States Court of Appeals
for the District of Columbia Circuit

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Judge, United States Court of Appeals
for the District of Columbia Circuit

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760 APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO
A DECREE

of the United States Court of Appeals for the District of Columbia Circuit, enforcing an order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL NOT discourage membership in any labor organization of our employees, by discharging or refusing to reinstate any of our employees, or in any other manner discriminating in regard to their hire or tenure of employment, or any term or condition thereof, because of their activity in behalf of or membership in such labor organization.

WE WILL offer to Welch Gross, upon his application, immediate and full reinstatement in his former position or in one substantially equivalent, without prejudice to any seniority or other rights and privileges he previously had, with back pay from the date of his discharge to the date of his reinstatement.

WE WILL offer assignments to Joe Lackey, upon his re-employment, the equivalent to those he had before he was removed from his regular run.

WE WILL NOT interrogate our employees concerning their activities in behalf of any labor organization in a manner which constitutes interference, restraint or coercion in violation of Section 8 (a) (1) of the Act, and we will not engage in surveillance of our employees at labor organization meetings.

WE WILL NOT interfere with the formation or administration of any labor organization or contribute financial or other support to any such organization.

WE WILL NOT give effect to our agreement, dated May 22, 1954, with District 50, United Mine Workers of America, or to any other contract or agreement with District 50 which may now be in force, since the National Labor Relations Board has held that the contract was brought about through unfair labor practices.

WE WILL NOT recognize District 50 as the bargaining representative of our employees, unless and until it shall have been certified as such representative by the National Labor Relations Board, or shall have been selected as such by a majority of our employees at a time at least 60 days later than the date of this notice.

All our employees are free to become, remain, or refrain from becoming, members of any labor organization, except

to that extent that this right may be affected by agreements made in conformity with Section 8 (a) (3) of the National Labor Relations Act, as amended.

BOWMAN TRANSPORTATION, INC.
(Employer)

Dated ..... By .....
(Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

762 (File Endorsement Omitted)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

(Title Omitted)

Stipulation—Filed December 12, 1955

It is hereby stipulated by and between the parties that Question "c" in the Stipulation dated November 14, 1955, heretofore filed in this case is not presented in this proceeding, and said previous stipulation is hereby amended to delete that question.

/s/ MAURICE F. BISHOP
Counsel for
Bowman Transportation, Inc.

Dated at Birmingham, Ala.
this 7th day of December, 1955

/s/ E. CRAMPTON HARRIS
Counsel for District 50
United Mine Workers of America

Dated at Washington, D. C.
this 8th day of December, 1955.

/s/ MARCEL MALLET-PREVOST
Marcel Mallet-Prevost
Assistant General Counsel
NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D. C.
this 5 day of December, 1955.

763 (File Endorsement Omitted)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

OCTOBER TERM, 1955

(Title Omitted)

Before: Prettyman, Circuit Judge, In Chambers.

Order Amending Stipulation—Filed December 13, 1955

Upon consideration of the stipulation by all parties to the above cases that the stipulation dated November 14, 1955 and approved by me on November 29, 1955, be amended by deleting therefrom question "c", it is

ORDERED that the question "c" be stricken from the stipulation filed herein November 29, 1955.

Dated: December 13, 1955

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767 SUPREME COURT OF THE UNITED STATES

No. 672, October Term, 1956

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

DISTRICT 50, UNITED MINE WORKERS OF AMERICA AND BOWMAN TRANSPORTATION, INC.

Order Allowing Certiorari—Filed February 25, 1957

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted, and the case is transferred to the summary calendar.

And it is further orderd that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE 1957—439290/P O. 397

No. [redacted]

In the Supreme Court of the United States

OCTOBER TERM, 1956

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

DISTRICT 50, UNITED MINE WORKERS OF AMERICA AND BOWMAN TRANSPORTATION, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

J. LEE RANKIN,

Solicitor General

[redacted]

MORTON HOLLANDER,

STEPHEN LEONARD,

DOMINICK L. MANOLI,

FREDERICK U. REEL,

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. ——

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

DISTRICT 50, UNITED MINE WORKERS OF AMERICA AND BOWMAN TRANSPORTATION, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered on October 4, 1956, modifying, at the instance of District 50, United Mine Workers of America, the Board's order against Bowman Transportation, Inc.

OPINIONS BELOW

The majority and dissenting opinions of the court below (Appendix, *infra*, pp. 12–27) have not yet been reported. The findings, conclusions, and order of the Board (R. 675–703, 714–719) are reported at 112

NLRB 387, and its Supplemental Decision and Order (R. 730–736) is reported at 113 NLRB 786.[1]

JURISDICTION

The judgment of the court below was entered on October 4, 1956 (Appendix, *infra*, pp. 27–28). The jurisdiction of this Court is invoked under 28 U. S. C. 1254, and Section 10 (e) of the National Labor Relations Act, as amended.

QUESTIONS PRESENTED

1. Having found that the employer in this case rendered unlawful assistance to a labor union (District 50), the Board prescribed its customary remedy directing the employer, *inter alia*, to withhold recognition from that union unless and until it was certified by the Board as the bargaining representative of the employees. The first question presented is whether application of this remedy is in excess of the Board's authority because the union's failure to meet the filing requirements of Section 9 (f), (g), and (h) makes it currently ineligible for certification.

2. Whether, assuming that the Board's order was in excess of its authority, the court of appeals erred in rewriting the order instead of remanding the case to the Board.

3. Whether the court below improperly interfered with the agency's discretion in fashioning its remedy by eliminating from the Notice prescribed by the

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[1] Of the voluminous record in this case, the Court, for purposes of the instant petition, need be concerned only with pages 675–736.

Board all references to the Teamsters Union (the union disadvantaged by the employer's several unfair labor practices).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151 *et seq.*) are reprinted in the Appendix, *infra*, pp. 28–34.

STATEMENT

I. THE FINDINGS, CONCLUSIONS, AND ORDER OF THE BOARD

Following the customary unfair labor practice proceedings before a Trial Examiner of the Board, the Examiner found that Bowman Transportation, Inc. had violated Section 8 (a) (1), (2), and (3) of the Act in that it (a) engaged in surveillance over its employees at a meeting of the Teamsters Union;[2] (b) interrogated employees regarding their activities on behalf of the Teamsters; (c) discriminated against two employees for supporting the Teamsters; and (d) illegally assisted and supported District 50[3] in that union's efforts to organize the employees (R. 675–701). The Examiner recommended that the Board order Bowman to cease and desist from its unfair labor practices; to make whole the employees discriminatorily treated; to stop giving effect to its contract with District 50; and to withhold recognition from that union as representative of Bowman's em-

[2] International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, Local No. 612.

[3] District 50, United Mine Workers of America.

ployees unless and until it was certified as such representative by the Board (R. 701–703). The Examiner further recommended that the Board order Bowman to post a Notice reciting, *inter alia*, that it would not, by unlawful discrimination, discourage membership in Teamsters or in any other labor organization (R. 703).[1]

Bowman filed exceptions to the Trial Examiner's report, challenging his findings, conclusions, and recommendations, but expressing no specific objection to the terms of the recommended Notice (R. 704–713). The Board, with minor modifications not here pertinent, approved the Examiner's report and adopted his recommended order (R. 714–719).

District 50 thereupon applied to the Board for a modification of the order insofar as it required Bowman to withhold recognition from District 50 as representative of the employees unless and until it was certified as such representative by the Board (R. 725–728). Pointing out that it had not complied with the filing requirements of Section 9 (f), (g), and (h) of the Act and hence was ineligible for certification, District 50 urged that the Board's order imposed an unlawful restriction on District 50's right to represent Bowman's employees and an unlawful penalty for non-compliance with the filing requirements of Section 9 (R. 725–728). The Board, in a Supplemental Decision, adhered to its original order (R. 732–736). Noting that a union's right to recognition

[1] Pertinent excerpts of the Trial Examiner's recommended Notice, inadvertently omitted from the Joint Appendix in the court below, are reprinted in the Appendix, *infra*, p. 35.

as exclusive bargaining agent derived solely from the Act, the Board declared that it was under a statutory duty to determine that such status was acquired free of employer assistance, and that it could best make this determination by means of a fair election (R. 732–734). The Board observed that the remedy invoked was far less drastic than requiring the complete disestablishment of the union, and that both of these remedies—disestablishment and withholding recognition until certified—have been judicially approved as proper exercises of the Board's powers (R. 733–734). Since the remedy was valid when applied to unlawfully assisted unions which had complied with the filing requirements of Section 9, the Board concluded that it was no less so as applied to District 50, reasoning that non-compliance by a union could not entitle it to preferential treatment (R. 734–736).[5]

II. THE DECISION OF THE COURT BELOW

The court below was unanimous in sustaining the Board's findings and conclusions with respect to Bowman's unfair labor practices (*infra*, p. 16). A majority of the court (Judge Washington dissenting) held, however, that the Board lacked authority to require that Bowman withhold statutory recognition from the

[5] The Board also noted that it thought the union's request for reconsideration was untimely, because it had not filed exceptions to the Intermediate Report (R. 732). The Board abandoned this position in the court below upon ascertaining that, as the result of a clerical inadvertence, the Union had not been officially served with a copy of the Report.

unlawfully assisted District 50 unless and until that union was certified by the Board (*infra*, pp. 16–19, 21–26). The majority's view was that this Court's decision in *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U. S. 62, 71–72, precluded the Board from making certification a prerequisite to recognition (*infra*, pp. 16–17). The court directed that the Board's order, insofar as the order required Bowman to withhold statutory recognition from District 50 unless and until District 50 was certified, be modified by addition of the phrase "or shall have been freely chosen as such [statutory representative] by a majority of the employees after all effects of unfair labor practices have been eliminated" (*infra*, p. 18; see R. 715, 716). In so doing, the majority indicated that, in its view, the ill effects of the unfair labor practices would be removed by Bowman's compliance with the remaining terms of the Board's order, including the posting of notices for 60 days (*infra*, p. 19).

Finally, the majority of the court below modified the Notice prescribed by the Board, eliminating all references to the Teamsters Union (*infra*, pp. 19–21; cf. R. 717, 718). Its opinion states that the references to the Teamsters Union in the Board's proposed Notice are "susceptible of being construed" as indicating that the Board preferred the Teamsters and "might better be omitted so that the company's pledges of non-interference will apply to all labor organizations" (*infra*, pp. 19–20).

In his dissenting opinion, Judge Washington substantially adopted the views expressed by the Board

(*infra*, pp. 21–26; cf. R. 732–736). He further observed that assuming, *arguendo*, the invalidity of the Board's order, the court exceeded its authority in rewriting the order to incorporate a different remedy, instead of remanding the case to the Board (*infra*, pp. 26–27).

REASONS FOR GRANTING THE WRIT

1. The holding that the Board could not remedy the unfair labor practice of unlawful assistance by requiring that District 50 be denied recognition until it demonstrated its free majority in a Board representation proceeding is susceptible of two constructions, either one of which presents questions warranting review by this Court.

Under one construction, the Board's remedy would be valid as applied to unions which have complied with the filing requirements of Section 9 (f), (g), and (h) and invalid only as applied to unions, like District 50, which have not complied.[5] This results, as the dissent points out (*infra*, pp. 23–24), in rewarding non-compliance and in penalizing compliance with the filing requirements, thus frustrating the Congressional purpose in adopting those requirements (*Amer-*

[5] This appears to be the view of the Court of Appeals for the Fourth Circuit. See *District 50 v. National Labor Relations Board*, 234 F. 2d 565, quoted in both the majority and the dissenting opinions of the court below (*infra*, pp. 17, 23). The Fourth Circuit expressly recognized that the order here in question "would be appropriate if applied to a [complying] union * * *." 234 F. 2d at 571. No review was sought in that case because the court there remanded the case on the merits.

ican Communications Assn. v. *Douds*, 339 U. S. 382, 393).

The other possible construction is that the court regards the Board's remedy invalid as applied to any unlawfully assisted union, whether or not the union in question has met the filing requirements.[7] This construction, which results in invalidating a remedy repeatedly applied by the Board throughout its twenty-year history,[8] and uniformly approved by the courts,[9] likewise raises a question of importance in

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[7] Thus, the majority's opinion declares broadly (*infra*, p. 16):

> This leaves for consideration paragraphs 1 (d) and 2 (c) of the order which direct Bowman to cease and desist from recognizing District 50 as the bargaining representative, and to withdraw and withhold such recognition, "unless and until the said labor organization shall have been certified as such representative by the Board." District 50's attack on these portions of the order raises the question whether the Labor Board has authority to forbid an employer to recognize or contract with a labor organization chosen by its employees as their exclusive bargaining representative so long as the union remains uncertified as such.
>
> We hold the Board does not have such authority. * * *

[8] Apparently the remedy was first applied in *Lenox Shoe Co.*, 4 NLRB 372, 388. It has since become a standard Board remedy in cases of unlawfully assisted unions. See, *e. g.*, the following annual reports of the Board: Eighth (1943), p. 30; Thirteenth (1948), pp. 50–51; Twentieth (1955), p. 75.

[9] See, *e. g.*, *Elastic Stop Nut Corp.* v. *National Labor Relations Board*, 142 F. 2d 371, 380 (C. A. 8); *National Labor Relations Board* v. *Parker Bros.*, 209 F. 2d 278, 279, 280 (C. A. 5); *National Labor Relations Board* v. *Braswell Motor Freight Lines*, 209 F. 2d 622, 624, 625 (C. A. 5); *National Labor Relations Board* v. *Wemyss*, 212 F. 2d 465, 473–474 (C. A. 9); *Independent Employees Assn.* v. *National Labor Relations Board*, 158 F. 2d 448, 456–457 (C. A. 2), certiorari denied, 333 U. S. 826; see also note 6, *supra*.

the administration of the Act. The Board's order rests on the agency's view that, in order to remedy the unfair labor practice of unlawful assistance, it may be necessary and appropriate to require the employer to withhold recognition from the beneficiary of his unlawful aid (the union) until the latter has demonstrated, in a representation proceeding conducted under Board safeguards, that it represents a free and uncoerced majority of the employees. In the light of this Court's repeated admonition that "[t]he Board not the courts determines under this statutory scheme how the effect of unfair labor practices may be expunged" (*National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584, 600, and cases there cited), the action of the court below in overturning a long-approved Board remedy warrants review by this Court.[10]

2. In addition to holding that the Board's order was improper, the court below prescribed an amendment to the order and entered a decree enforcing the order as amended. As this Court observed in *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S.

[10] Contrary to the suggestion of the court below (*infra*, pp. 16-17), this Court's decision in *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U. S. 62, is not dispositive of this case. In holding that a union's failure to meet the filing requirements did not authorize a state to infringe rights granted by the Act, this Court noted that the statute did not condition recognition upon compliance with the filing requirements (351 U. S. at 71-72), but the Court also noted that noncompliance did not exempt a union from other applicable provisions of the Act (*id.* at 70), including, presumably, the provisions of Section 8 (a) (2) dealing with unlawful assistance.

177, 194. "Because the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy." The court below in undertaking to prescribe its own remedy for unfair labor practices entered a province which, as this Court has repeatedly emphasized, is reserved to the Board. *Link-Belt* case, *supra*, 311 U. S. at 600, and cases cited. The appropriate course, assuming the court's rejection of the Board's order, would have been to remand the case to the Board for the framing of a new order. *Federal Power Commission* v. *Idaho Power Co.*, 344 U. S. 17, 20–21.

3. Despite the fact that the point was not raised at the administrative level or in the review proceeding, the court, *sua sponte*, struck from the Notice to be posted by the Company all references to the Teamsters Union. This action is directly contrary to the settled principle that, absent special circumstances, courts of appeals may not consider matters not raised before the administrative agency. *National Labor Relations Board* v. *Cheney California Lumber Co.*, 327 U. S. 385, 388–389, and cases there cited; see also *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U. S. 492, 493–494.

Apart from the court's error in considering a matter never brought to the Board's attention, we submit that the court's action in amending the Notice again manifests a failure to recognize that the fashioning of the remedy is the function of the Board.

Link-Belt case, *supra*. The Board's determination that the Notice expressly reassure the employees that they were free to join the Teamsters or any other union [11] was a proper, and certainly a reasonable, exercise of the Board's discretion, for the Teamsters were the prime target of the Company's unfair labor practices, and employees were spied upon, interrogated, and discharged because of activities on behalf of the Teamsters.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

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STEPHEN LEONARD,
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Assistant General Counsel,
FREDERICK U. REEL,
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National Labor Relations Board.

JANUARY 1957.

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[11] The court below apparently misread the Notice as not providing that "the company's pledges of non-interference will apply to all labor organizations" (*infra*, pp. 19-20; cf. R. 717-718, *infra*, p. 35).

APPENDIX

1. Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,887

DISTRICT 50, UNITED MINE WORKERS OF AMERICA, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Petition for Review of Order of National Labor Relations Board

No. 12,950

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

BOWMAN TRANSPORTATION, INC., RESPONDENT

Petition for Enforcement of an Order of the National Labor Relations Board

Decided October 4, 1956

Mr. E. Crampton Harris, with whom *Messrs. Yelverton Cowherd* and *Alfred D. Treherne* were on the brief, for petitioner in No. 12,887.

Mr. Frederick U. Reel, Attorney, National Labor Relations Board, of the bar of the Supreme Court of Wisconsin, *pro hac vice,* by special leave of Court, with whom *Messrs. Theophil C. Kammholz,* General

Counsel, National Labor Relations Board, *David P. Findling*, Associate General Counsel, National Labor Relations Board, and *Marcel Mallet-Prevost*, Assistant General Counsel, National Labor Relations Board, and *Mrs. Nancy M. Sherman*, Attorney, National Labor Relations Board, were on the brief, for respondent in No. 12,887 and petitioner in No. 12,950, *Mr. Robert G. Johnson*, Attorney, National Labor Relations Board, also entered an appearance for respondent in No. 12,887 and petitioner in No. 12,950.

No appearance for respondent in No. 12,950.

Before PRETTYMAN, WILBUR K. MILLER and WASHINGTON, Circuit Judges.

WILBUR K. MILLER, *Circuit Judge:* The National Labor Relations Board petitions for enforcement of its order which requires Bowman Transportation, Inc., an interstate trucking company, to cease and desist from certain unfair labor practices, and to redress them by taking the prescribed affirmative action. Bowman Transportation has not complained of the order and did not appear here. But District 50, United Mine Workers of America, which had been chosen by the Bowman employees as their exclusive bargaining representative but has not been certified as such by the Board, petitions us to review and set aside three paragraphs of the order by which it feels aggrieved.

The background of the Labor Board's order and its essential features may be quickly sketched. In November, 1953, the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, Local No. 612, undertook to organize Bowman's employees and established a picket line at its main terminal in Gadsden, Alabama. The Teamsters' efforts, opposed by the company, were unsuccessful but were still in progress, at least to the extent

of the picketing which a state court first enjoined but later permitted, with violence and disorder forbidden, when another labor organization appeared on the scene in May 1954.

The president of Bowman called a meeting of all employees for May 22, after having been told by some employees they wanted a contract, and after having conferred with organizers for District 50. The meeting was largely attended. Those present voted unanimously to be represented by District 50 and most of them signed authorization cards, whereupon Bowman recognized that union as the bargaining representative and entered into a contract with it.

Because of these events, the General Counsel of the Labor Board charged Bowman with several unfair labor practices. After a hearing the Board found: (1) that Bowman discriminatorily discharged driver Gross and removed driver Lackey from his regular run because of their activities in behalf of Teamsters, thereby discouraging membership in that union, an unfair labor practice within the meaning of § 8 (a) (3) of the Act; (2) that Bowman interfered with the administration of District 50 and contributed support to it and so engaged in unfair labor practices within the meaning of § 8 (a) (2) of the Act; and (3) that Bowman interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in § 7 of the Act, and thereby engaged in unfair labor practices within the meaning of § 8 (a) (1) of the Act.

Upon these findings, the Board ordered Bowman to cease and desist from: 1. (a) the unfair labor practices found by it; 1. (b) interfering with, restraining or coercing its employees in the exercise of their statutory rights; and from

> "[1] (c) Giving effect to the collective bargaining agreement, dated May 22, 1954, between

for strikes, (i) authorization for disbursement of union funds, (j) audit of union financial transactions, (k) participation in insurance or other benefit plans, and (l) expulsion of members and the grounds therefor;

and (B) can show that prior thereto it has—

(1) filed with the Secretary of Labor, in such form as the Secretary may prescribe, a report showing all of (a) its receipts of any kind and the sources of such receipts; (b) its total assets and liabilities as of the end of its last fiscal year, (c) the disbursements made by it during such fiscal year, including the purposes for which made; and

(2) furnished to all of the members of such labor organization copies of the financial report required by paragraph (1) hereof to be filed with the Secretary of Labor.

(g) It shall be the obligation of all labor organizations to file annually with the Secretary of Labor, in such form as the Secretary of Labor may prescribe, reports bringing up to date the information required to be supplied in the initial filing by subsection (f) (A) of this section, and to file with the Secretary of Labor and furnish to its members annually financial reports in the form and manner prescribed in subsection (f) (B). No labor organization shall be eligible for certification under this section as the representative of any employees, and no complaint shall issue under section 10 with respect to a charge filed by a labor organization unless it can show that it and any national or international labor organization of which it is an affiliate or constituent unit has complied with its obligation under this subsection.

(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35A of the Criminal Code shall be applicable in respect to such affidavits.

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. * * *

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies

> the Respondent and District 50, United Mine Workers of America, or to any extension, renewal or modification thereof, or any other contract agreement between the Respondent and the said labor organization which may now be in force;
>
> "[1] (d) Recognizing District 50, United Mine Workers of America, as the representative of its employees for the purpose of dealing with the Respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until the said labor organization shall have been certified as such representative by the Board."

The portion of the order requiring affirmative action directed Bowman to offer reparations to drivers Gross and Lackey, and to

> "[2] (c) Withdraw and withhold all recognition from District 50, United Mine Workers of America, as representative of its employees for the purpose of dealing with the Respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until the said labor organization shall have been certified as such representative by the Board."

The order also required Bowman to post prescribed notices.

May 11, 1955, before enforcement of the order had been sought, District 50, which had not theretofore been a party to the proceeding, filed with the Board an application to modify the order by striking therefrom paragraphs 1 (c), 1 (d) and 2 (c), which we have reproduced above. The application was denied by the Board.

Part of the background of the Board's order is the fact that the Teamsters union had theretofore filed the information and affidavits described in § 9 (f), (g)

and (h) of the Labor Management Relations Act, 1947, while United Mine Workers of America, the parent union of District 50, has not filed thereunder. Teamsters was and is therefore eligible to be certified as the bargaining representative of Bowman's employees if it were chosen by them, but District 50, though chosen, may not be certified so long as its parent is in a state of noncompliance.

That Bowman had engaged in the unfair labor practices found by the Board clearly apears from the evidence. It was appropriate to order, as the Board did, that the employer correct its discriminatory treatment of drivers Gross and Lackey, and that it cease and desist from giving effect to its contract with District 50, which was unfairly arrived at through Bowman's illegal assistance to that union. In those respects the order should be enforced.

This leaves for consideration paragraphs 1 (d) and 2 (c) of the order which direct Bowman to cease and desist from recognizing District 50 as the bargaining representative, and to withdraw and withhold such recognition, "unless and until the said labor organization shall have been certified as such representative by the Board." District 50's attack on these portions of the order raises the question whether the Labor Board has authority to forbid an employer to recognize or contract with a labor organization chosen by its employees as their exclusive bargaining representative so long as the union remains uncertified as such.

We hold the Board does not have such authority. In *United Mine Workers of America* v. *Arkansas Oak Flooring Co.*, 351 U. S. 62, 71–2 (1956), the Supreme Court observed that there is no statutory provision to the effect that a non-complying union "may not represent an appropriate unit of employees

if a majority of those employees give it authority so to do." The Court went on to say:

> "* * * Likewise, there is no statement precluding their employer from voluntarily recognizing such a noncomplying union as their bargaining representative. Section 8 (a) (5) declares it to be an unfair labor practice for an employer 'to refuse to bargain collectively with the representatives of his employees, *subject to the provisions of section 9 (a)*.' (Emphasis supplied.) Section 9 (a), which deals expressly with employee representation, says nothing as to how the employees' representative shall be chosen. See *Lebanon Steel Foundry* v. *Labor Board*, 76 U. S. App. D. C. 100, 103, 130 F. 2d 404, 407. It does not make it a condition that the representative shall have complied with § 9 (f), (g) or (h), or shall be certified by the Board, or even be eligible for such certification."

In footnote 8, 351 U. S. at 72, the Court noted that "A Board election is not the only method by which an employer may satisfy itself as to the union's majority status."

In a recent case somewhat similar to this one,[1] Chief Judge Parker of the Fourth Circuit discussed the *Oak Flooring* opinion and said:

> "* * * If a cease and desist order were proper under the circumstances of the case, it should have been couched in language which would not have precluded representation of the employees by District 50 if chosen by a majority to represent them after all effects of any unfair labor practice had been eliminated."

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[1] *District 50, United Mine Workers of America* v. *National Labor Relations Board and Pittsburgh Valve Co.* v. *National Labor Relations Board*, 234 F. (2d) 565, 571 (4th Cir. 1956).

We adopt the language just quoted as applicable to this case. Paragraphs 1 (d) and 2 (c) are therefore improper and should not be enforced in their present form, since they preclude District 50 from representing the employees in the future, even though hereafter they should choose it in an atmosphere and a situation entirely free from the influence of unfair labor practices. There should be added, at the end of each of those paragraphs, the words "or shall have been freely chosen as such by a majority of the employees after all effects of unfair labor practices have been eliminated."

With paragraphs 1 (d) and 2 (c) amended in the manner indicated above, and with the slight changes in the notice to be posted by the company which will hereinafter be suggested, we think the order will achieve the Board's proper objective, which is to eliminate the effects of Bowman's unfair labor practices so as to place Teamsters, District 50, employer and employees *in statu quo ante,* and to forbid and guard against future unfair practices by the employer, so that thereafter the employees and any and all unions concerned may work out the representation problem, untrammeled by any outside influence. When this objective has been reached, and if the employees then want a bargaining representative, they will be in a position to choose one in any manner which clearly indicates their desire. They may select non-complying District 50, or complying Teamsters, or any other complying or non-complying union, and the employer must recognize their choice. The only limitation is that, if the Board conducts an election, District 50 will not be on the ballot. Amended in the manner we have indicated, the order will be enforced.

There still remains, however, the necessity of deciding when the ill effects of Bowman's past practices

the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

have been removed. Certainly, one effect of Bowman's unfair labor practices is removed by requiring the offer of reparation to the two drivers. Another is eliminated by striking down the present contract, unfairly arrived at, between Bowman and District 50. The possibility of continuing effect is guarded against by ordering Bowman (1) to cease and desist from the labor practices found to be unfair; (2) to refrain in the future from engaging in those or any other unfair practices; and (3) to post notices for 60 days that, in obedience to the Board's order, it will make the required amends and will not in the future interfere in any way with the organizational efforts of any union, or with the employees' exercise of the rights guaranteed to them by law.

We think that, 60 days after the notices have been posted, it may reasonably and safely be assumed that normalcy has been restored by the Board's corrective order. Thereafter, if a Board election should be required and if the employees should therein select Teamsters or some other complying union as bargaining representative, the matter would be at an end. But, if in an election the employees should reject any and all candidates, or if no election is held, and if the employees should designate District 50 as their choice, that union will become the bargaining representative.

The form of notice to be posted by the company should be modified so as not to be inconsistent with this opinion. Moreover, the notice should not indicate that the Board prefers Teamsters. We suggest that references to that union in the Board's form of notice are susceptible of being construed as so indicating, and might better be omitted so that the company's pledges of non-interference will apply to all

labor organizations. We attach as an appendix what we regard as a proper notice.

The order under review will be amended in the manner set forth in the foregoing opinion. As so amended, the order will be enforced.

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO
A DECREE

of the United States Court of Appeals for the District of Columbia Circuit, enforcing an order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL NOT discourage membership in any labor organization of our employees, by discharging or refusing to reinstate any of our employees, or in any other manner discriminating in regard to their hire or tenure of employment, or any term or condition thereof, because of their activity in behalf of or membership in such labor organization.

WE WILL offer to Welch Gross, upon his application, immediate and full reinstatement in his former position or in one substantially equivalent, without prejudice to any seniority or other rights and privileges he previously had, with back pay from the date of his discharge to the date of his reinstatement.

WE WILL offer assignments to Joe Lackey, upon his re-employment, the equivalent to those he had before he was removed from his regular run.

WE WILL NOT interrogate our employees concerning their activities in behalf of any labor

organization in a manner which constitutes interference, restraint or coercion in violation of § 8 (a) (1) of the Act, and we will not engage in surveillance of our employees at labor organization meetings.

WE WILL NOT interfere with the formation or administration of any labor organization or contribute financial or other support to any such organization.

WE WILL NOT give effect to our agreement, dated May 22, 1954, with District 50, United Mine Workers of America, or to any other contract or agreement with District 50 which may now be in force, since the National Labor Relations Board has held that the contract was brought about through unfair labor practices.

WE WILL NOT recognize District 50 as the bargaining representative of our employees, unless and until it shall have been certified as such representative by the National Labor Relations Board, or shall have been selected as such by a majority of our employees at a time at least 60 days later than the date of this notice.

All our employees are free to become, remain, or refrain from becoming, members of any labor organization, except to the extent that this right may be affected by agreements made in conformity with § 8 (a) (3) of the National Labor Relations Act, as amended.

BOWMAN TRANSPORTATION, INC.
(Employer)

Dated ---------- By ----------
(Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

WASHINGTON, *Circuit Judge*, dissenting: I am constrained to disagree with the court's action in modifying the Board's order.

1. Section 10 (c) of the Labor Management Relations Act of 1947, 29 U. S. C. § 160 (c) (1952), authorizes the Board, when it finds that an unfair labor practice has been committed, to "cause to be served on such person [committing the unfair labor practice] an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action * * * as will effectuate the policies of this subchapter."[1] These policies include, among others, the elimination of unfair labor practices by employers and unions, and the protection of the employees' right to designate a bargaining representative of their own choosing, as expressed in Section 9 (a) of the Act.

It seems quite clear that a provision prohibiting an employer from recognizing a union unfairly controlled or supported by the employer until that union has been certified as the bargaining agent of the employees would in many cases be an important factor in purging unfair labor practices. In remedying such practices the Board has long inserted a provision of that sort in its orders. Even stronger action has sometimes been taken by the Board, and the Supreme Court has supported it. For example, employer-dominated unions have on occasion been ordered completely disestablished, with Supreme Court approval. *National Labor Relations Board* v. *Falk Corp.*, 308 U. S. 453 (1940); *H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U. S. 514 (1941); *Labor Board* v. *Link-Belt Co.*, 311 U. S. 584 (1941). And in a case where the employer had assisted union A, the Board ordered him to deal exclusively with union B

[1] The subchapter referred to is that titled "National Labor Relations," which deals generally with the Labor Board, its powers, procedures, and jurisdiction.

(a rival), even though before the order was issued the Board had been advised that a majority of the employees wished to be represented by the assisted union. The order was upheld. *International Association of Machinists* v. *Labor Board*, 311 U. S. 72 (1940). In view of these precedents, the Board may surely take a less stringent course, and in an appropriate case order non-recognition by the employer of the assisted union as long as it remains uncertified. As to unions complying with the filing provisions of the Act, that conclusion would seem beyond question. As Chief Judge Parker said in *District 50, United Mine Workers* v. *National Labor Relations Board*, 234 F. 2d 565 (4th Cir. 1956):

> "* * * the form of order here entered [similar to that in the instant case] would be appropriate if applied to a union which had complied with the filing provisions of the Labor Management Relations Act * * *."

The question here, of course, is whether the fact that a union has not complied with the filing provisions of the Act, and refuses to comply, entitles it to special treatment by the Board. The Ninth Circuit has answered this question in the negative.[2] Yet the decision of the majority here, and of the Fourth Circuit in the *District 50* case, is to the contrary. The holding is—in substance and effect—that the Board cannot as a matter of law apply to a union which has not complied with the filing provisions of the law, and

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[2] See *National Labor Relations Board* v. *Womyss*, 212 F. 2d 465 (9th Cir. 1954), where the assisted union had not complied with Section 9 (f), (g), or (h) (see p. 470), and where the court held that the assistance given warranted issuance of "an order that the employer withdraw recognition from the favored organization unless and until it is certified by the Board after a fair election" (p. 472).

which has engaged in unfair labor practices, the very condition which it could rightfully apply to a complying union. I find no basis in principle for giving a non-complying union an advantage which complying unions do not have. In practice to do so may encourage unions not to comply with the Act.

Mine Workers v. *Arkansas Oak Flooring Co.*, 351 U. S. 62 (1956), relied on by the majority, simply holds that noncompliance by a union with Section 9 (f), (g), and (h) of the Act does not open the door to the state courts to take action against the union that they would not otherwise be able to take. As I read that decision, it was intended to preserve and protect the authority of the National Labor Relations Board, not to undermine and weaken it. It can hardly be interpreted as holding that noncompliance by a union prevents the National Labor Relations Board from taking action which it is authorized to take against a *complying* union, and which the Act itself permits. It is true that the Supreme Court's opinion declares that "no consequences other than those so listed [in the Act] shall result from noncompliance." 351 U. S. at 73. But the context of this sttaement indicates that the Court was referring to consequences apart from those sanctioned by the Act itself. "Elimination of the Board [as a forum of resort by any union not complying with the filing provisions of the Act] does not, however, eliminate the applicability of the National Labor Relations Act, as amended * * *." *Id.* at 74.

2. The principle is now well established that the Board, and not the courts, is primarily charged with the responsibility of determining what provisions are best included in Board orders to carry out the policies of the Act. "The particular means by which the effects of unfair labor practices are to be expunged are

matters 'for the Board not the courts to determine' * * *. We give considerable weight to that administrative determination. It should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Electric Co. v. Labor Board*, 319 U. S. 533, 539–40 (1943), citing *International Association of Machinists* v. *Labor Board*, 311 U. S. 72 at 82 (1940); *Labor Board* v. *Link-Belt Co.*, 311 U. S. 584 at 600 (1941). The majority has not suggested that the Board's order does not effectuate the policies of the Act or that it was not intended to do so. Nor, as I view the case, could such a conclusion fairly be reached.

Concededly, if District 50 or its parent organization persists in refusing to file the required statements and affidavits, the Board's order will effectually preclude the employer from recognizing and contracting with District 50 as the employees' bargaining agent, even though the employees continue to favor it. But this restraint on the employees' freedom of choice is in part due to the attitude of the union, which has chosen not to comply with Section 9. Furthermore, if the Board properly concludes that the certification of the union in the normal way is necessary to dissipate the effect of the unfair labor practices, the order would tend to assure—rather than deny—the freedom of choice guaranteed by the Act by removing improper restraints on the employees. See *International Association of Machinists* v. *Labor Board*, 311 U. S. at 82; *H. J. Heinz Co.* v. *Labor Board*, 311 U. S. at 522.

The Board stated here that the disputed provision of its order was included "To remedy the effect of the illegal assistance to the UMW," and further that:

> "By its Order, the Board is merely directing that the UMW, like any other assisted union,

> demonstrate that its right to be the exclusive representative of the employees involved has been established in an atmosphere free of restraint and coercion."

And with regard to its previous practice the Board stated:

> "However, in the case of an assisted but undominated labor organization, the Board has required the offending employer to withdraw and withhold recognition from the assisted union until it was certified, thus enabling the Board to assure the affected employees that their statutory right to freely choose a bargaining representative shall be preserved by conducting an election under conditions which will render such a choice possible."

It is true that the Board did not expressly consider any alternative remedies—such as conducting an investigation at a later time to determine whether the effects of the unfair labor practices had by then been dissipated. But District 50 suggested no such alternative: it simply argued to the Board that the order was beyond the Board's power. When this argument was rejected, it appealed to this court on the same ground. As I have indicated, I think that ground is clearly untenable: in a proper case, the Board has power to enter an order of the present sort. And I think that this is such a case, and that the Board's findings were adequate to support its action—especially since it was never asked to consider any other type of action. But if this be doubted, *cf. Siegel Co. v. Federal Trade Commission*, 327 U. S. 608 (1946), the proper course for this court is to remand the case to the Board for further consideration. Certainly it is not within our province for us to rewrite the Board's order to choose a different remedy than it has chosen, and to direct that our new order be enforced.

See *National Labor Relations Board* v. *Falk Corp.*, 308 U. S. 453 (1940); *Federal Power Commission* v. *Idaho Power Co.*, 344 U. S. 17, 20 (1952).

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2. Judgment below

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OCTOBER TERM, 1956

No. 12,887

DISTRICT 50, UNITED MINE WORKERS OF AMERICA, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

OCTOBER TERM, 1956

No. 12,950

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

BOWMAN TRANSPORTATION, INC., RESPONDENT

On Petition for Review and on Petition for Enforcement of an Order of the National Labor Relations Board

Before: PRETTYMAN, WILBUR K. MILLER and WASHINGTON, Circuit Judges.

ORDER AND DECREE

These cases came on to be heard on the record from the National Labor Relations Board and on a peti-

tion for review and a petition for enforcement of the order of the National Labor Relations Board herein, and were argued by counsel.

On consideration whereof, it is ORDERED and DECREED by the Court that the order of the Board on review herein be, and the same is hereby, modified as indicated in the opinion of this Court and, as so modified, will be enforced.

It is, therefore, ORDERED by the Court that the National Labor Relations Board shall within 10 days serve and file a proposed enforcement decree and form of notice conforming with the views set forth in the opinion of this Court. The provisions of paragraph (1) of Rule 38 of this Court shall apply thereto.

Dated: October 4, 1956.

Per Circuit Judge WILBUR K. MILLER.

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3. Statute Involved

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*) are as follows:

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

* * * * *

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it * * *

* * * * *

REPRESENTATIVES AND ELECTIONS

SEC. 9. (f) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees,

raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless such labor organization and any national or international labor organization of which such labor organization is an affiliate or constituent unit (A) shall have prior thereto filed with the Secretary of Labor copies of its constitution and bylaws and a report, in such form as the Secretary may prescribe, showing—

(1) the name of such labor organization and the address of its principal place of business;

(2) the names, titles, and compensation and allowances of its three principal officers and of any of its other officers or agents whose aggregate compensation and allowances for the preceding year exceeded $5,000, and the amount of the compensation and allowances paid to each such officer or agent during such year;

(3) the manner in which the officers and agents referred to in clause (2) were elected, appointed, or otherwise selected;

(4) the initiation fee or fees which new members are required to pay on becoming members of such labor organization;

(5) the regular dues or fees which members are required to pay in order to remain members in good standing of such labor organization;

(6) a detailed statement of, or reference to provisions of its constitution and bylaws showing the procedure followed with respect to, (a) qualification for or restrictions on membership, (b) election of officers and stewards, (c) calling of regular and special meetings, (d) levying of assessments, (e) imposition of fines, (f) authorization for bargaining demands, (g) ratification of contract terms, (h) authorization

of this Act: *Provided*, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further*, That in determining whether a complaint shall issue alleging a violation of section 8 (a) (1) or section 8 (a) (2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

* * * * *

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 64

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

DISTRICT 50, UNITED MINE WORKERS OF AMERICA AND BOWMAN TRANSPORTATION, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court below (R. 49–61) is reported at 237 F. 2d 585. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 3–26, 35–40) are reported at 112 NLRB 387, and its Supplemental Decision and Order (R. 43–48) is reported at 113 NLRB 786.

JURISDICTION

The judgment of the court below was entered on October 4, 1956 (R. 62–63). The petition for a writ of certiorari was filed on January 2, 1957, and was granted on February 25, 1957 (R. 70). 352 U. S. 999.

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of

4. Trial Examiner's Recommended Notice

NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE RECOMMENDATIONS OF A TRIAL EXAMINER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

> WE WILL NOT discourage membership in INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL No. 612, AFL, or in any other labor organization of our employees, by discharging or refusing to reinstate any of our employees, or in any other manner discriminating in regard to their hire or tenure of employment.
>
> * * * * *

All our employees are free to become, remain, or refrain from becoming members of any labor organization, except to the extent that this right may be affected by agreements in conformity with Section 8 (a) (3) of the National Labor Relations Act, as amended October 22, 1951.

BOWMAN TRANSPORTATION, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

U. S. GOVERNMENT PRINTING OFFICE 1956

STATEMENT

A. THE BOARD'S FINDINGS, CONCLUSIONS, AND ORDER

Following the customary unfair labor practice proceedings under Section 10 (b) of the National Labor Relations Act, a Trial Examiner of the National Labor Relations Board found that the employer in this case, Bowman Transportation, Inc., had violated Section 8 (a) (1), (2), and (3) of the Act (R. 24). Specifically, the Examiner found that, in order to defeat an organizational campaign by the Teamsters Union[1] among its employees, Bowman unlawfully interrogated employees regarding their activities on behalf of the Teamsters, engaged in surveillance of employees attending a Teamsters meeting, and discriminated against two employees for supporting the Teamsters (R. 5–17). The Examiner further found that, having rebuffed all attempts by the Teamsters to contact its president, Bowman thereafter unlawfully assisted and supported District 50[2] by negotiating a virtually complete bargaining agreement with its officials when District 50 did not, and Bowman had no reason to believe that it did, represent a single Company employee; by summoning employees from its various terminals to Company headquarters at Company expense where they were shown the contract they might expect if they selected District 50 as their bargaining representative, were required to disclose their opinion of District 50 in the presence of their supervisors, and were told that the Company would, if necessary, advance money to employees to pay their

[1] International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, Local No. 612.

[2] District 50, United Mine Workers of America.

dues; by inviting District 50 to use the terminal for organizational purposes and permitting the terminal to be used for the election of officers; and, on the very day District 50 was designated by a majority of the employees as their bargaining representative, by signing a complete bargaining agreement with that union almost identical to the contract which the employees were shown before they voted for District 50 (R. 6–7, 17–21).[2]

To remedy these unfair labor practices, the Examiner recommended that the Board issue its usual order directing that Bowman cease and desist from its unlawful conduct; make whole the employees discriminatorily treated; cease giving effect to its contract with District 50; and withhold recognition from that union as representative of Bowman's employees unless and until it was certified as such representative by the Board (R. 22–26). The Examiner further recommended that the Board direct Bowman to post a Notice reciting, *inter alia*, that it would not, by unlawful discrimination, discourage membership in the Teamsters or in any other labor organization (R. 26).

Bowman filed exceptions to the Examiner's report, challenging his findings, conclusions, and recommendations but expressing no specific objection to the terms of the recommended Notice (R. 27–34). The Board, with minor modifications not here pertinent, approved the Examiner's report and adopted his recommended order (R. 35–40).

[2] Except for a provision concerning grievances, this contract was in all material respects precisely the same as that drafted before any of the employees had signed cards in District 50 (R. 19–21).

District 50 thereafter applied to the Board for a modification of the order insofar as it required Bowman to withhold recognition from District 50 as representative of the employees unless and until it was certified as such representative by the Board (R. 40–43). Relying on the fact that its own voluntary refusal to comply with the filing requirements of Section 9 (f), (g) and (h) of the Act made it currently ineligible for certification, District 50 contended that the Board's order unlawfully restricted District 50's right to represent Bowman's employees and imposed an unlawful penalty for noncompliance with the filing requirements of Section 9 (R. 41–43). The Board, in a Supplemental Decision, adhered to its original order (R. 43–48). Noting that the right of the union to recognition as exclusive bargaining agent derives solely from the Act, the Board held that, in view of the unfair labor practices committed here, it was under a statutory duty to insure that such status thereafter was acquired free from employer assistance. This objective could best be attained through a Board-conducted election and the order merely directs that the union, like any other assisted union, demonstrate that its right to be the exclusive representative of the employees involved has been established in an atmosphere free of restraint and coercion (R. 45–47). Since the remedy was valid as against unlawfully assisted unions which had complied with the filing requirements of Section 9, there was no justifiable reason for according preferential treatment to a noncomplying union by eliminating the certification requirement (R. 47–48). Moreover, the Board further noted, any "penalty" which the union

No. 64

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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Department of Justice, Washington 25, D. C.

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references to the Teamsters Union (R. 55–57, 66–68). The Court stated that these references were "susceptible of being construed" as indicating that the Board preferred the Teamsters and hence "might better be omitted so that the company's pledges of non-interference will apply to all labor organizations" (R. 55).

Judge Washington, dissenting, substantially adopted the views expressed by the Board, and further observed that, even were the Board's order invalid, the court exceeded its authority by rewriting the order to prescribe a different remedy instead of remanding the case to the Board (R. 57–61).

SUMMARY OF ARGUMENT

I

A. In remedying unfair labor practices the Board is vested with broad discretionary power to require "such affirmative action * * * as will effectuate the policies" of the Act (Section 10 (c)). In the exercise of this authority the Board here directed, as it has repeatedly required in numerous other instances throughout its twenty-year history, that the employer withhold recognition from an unlawfully supported and assisted union unless and until the affected employees designate it as their representative in a secret ballot election conducted under Board safeguards. The Board's determination that this procedure is necessary to insure that the employees will have the freedom of choice concerning their representation which the Act contemplates is a valid one, resting within the broad discretion committed to the Board by Congress.

The Board's remedy is designed to effectuate the policies of the Act by affording the widest possible selection of bargaining agents to employees while at the same time insuring their complete freedom to accept or reject a previously assisted organization. The "privacy and independence of the voting booth" (*Brooks* v. *National Labor Relations Board*, 348 U. S. 96, 99–100) is essential in these circumstances to safeguard the employees' freedom of choice; otherwise there is a real danger that an employer's past preference will effectively deter them from freely disclosing their desires concerning representation and continue to obstruct their self-organization as contemplated by the Act. In meeting this threat by requiring that any assisted union demonstrate its majority status under the safeguards of a secret ballot election, the Board has adopted a remedial measure upheld by this Court in *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548, and applied in like circumstances by various administrative agencies prior to the adoption of the Wagner Act. Consistent Congressional approval, as well as the uniform judicial construction of both the original and the amended Act, confirm that the Board's remedy is wholly appropriate and necessary to restore employee freedom of choice.

B. That an assisted union has not chosen to comply with the filing requirements of the Act and hence is currently ineligible for certification in no way lessens the propriety of the Board's order. A noncomplying union which has accepted unlawful employer support cannot show, any more than can a complying

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cies of the federal Act." *National Labor Relations Board* v. *Gullet Gin Co.*, 340 U. S. 361, 365.

II

In any event, the court below "usurped an administrative function" (*Federal Power Commission* v. *Idaho Power Co.*, 344 U. S. 17, 20) in rewriting the Board's order to prescribe its own remedy for the unfair labor practices here committed. Accordingly, should this Court reject our contention that the Board's order is wholly valid, due regard for the respective functions of agency and reviewing court would suggest a remand of this case to the Board for the purpose of considering alternative remedies.

III

The court below further erred in striking from the Notice to be posted by the Company all references to the Teamsters, the union in which the Company discouraged membership. No contention concerning the propriety of the Notice in this respect was ever raised before the Board or before the court below. The Notice is in any event manifestly proper.

ARGUMENT

I. IN THE EXERCISE OF ITS BROAD DISCRETIONARY POWER TO FRAME REMEDIAL ORDERS AND INSURE THE EMPLOYEES' FREEDOM OF CHOICE IN THE SELECTION OF THEIR BARGAINING REPRESENTATIVE, THE BOARD MAY PROPERLY REQUIRE THAT RECOGNITION BE WITHHELD FROM ANY UNLAWFULLY ASSISTED UNION UNTIL ITS SELECTION IN A BOARD-CONDUCTED ELECTION

Section 10 (c) of the National Labor Relations Act vests in the National Labor Relations Board the power to require any person who has engaged in

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Board throughout its twenty-year history[4] in cases like this where the employer has given illegal assistance to a labor organization and thereby *pro tanto* restricted the employees' freedom of choice.

The principal question presented in this case is whether the broad discretionary power conferred on the Board by Section 10 (c) to insure the employees' freedom of choice through this remedy is lost solely because the unlawfully assisted union has elected not to comply with the filing requirements of Section 9 (f), (g) and (h) of the Act and hence cannot, as long as it remains out of compliance, be certified by the Board. Stated more generally, the issue which lies at the heart of this case is the Board's power to condition the future recognition of an illegally assisted union, irrespective of compliance or noncompliance with the statutory filing requirements, upon a Board election and certification. If the remedy represents a valid exercise of the Board's authority to redress unfair labor practices in the case of an employer-assisted but complying union, the factor of noncompliance should not invalidate the remedy.

In this brief we shall first discuss the basis for the Board's order, pointing out those factors which in the Board's considered judgment require its adoption. We shall show that the order serves, and is reasonably adapted to effectuating, the policies of the Act, and that its appropriateness is confirmed by the uniform judicial construction, legislative history, and other antecedents of the Act. We then argue that the pro-

[4] See n. 5, *infra*, p. 14.

priety of the order is in no way lessened because an assisted union does not choose to comply with the filing requirements of the Act and is therefore ineligible for Board certification; and that the order can in no sense be said to impose a penalty for noncompliance.

A. THE BOARD'S ORDER IS NECESSARY AND PROPER TO REMEDY THE EFFECTS OF UNLAWFUL EMPLOYER ASSISTANCE AND SUPPORT

It is the declared policy of the Act to assure workers, for purposes of collective bargaining, "full freedom of association, self-organization, and designation of representatives of their own choosing." (Section 1 of the original and the amended Act.) Because "collective action would be a mockery if representation were made futile by [such] interferences with freedom of choice" (*Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks,* 281 U. S. 548, 570), Congress, in Section 8 (2) of the original Act and Section 8 (a) (2) of the amended Act alike, outlawed all forms of support or domination by an employer of any labor organization.

Violations of this Congressional prohibition have confronted the Board since its inception with the task of restoring to the employees involved that "[f]reedom of choice in the selection of representatives" which "is the essential foundation of the statutory scheme." *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks,* 281 U. S. 548, 569. To this end the Board, with judicial approval, has required since its earliest days the permanent withdrawal of recognition from, and complete disestablishment of, any labor

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The jurisdiction of this Court rests on 28 U. S. C. 1254 and Section 10 (e) of the National Labor Relations Act, as amended.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*), are set out in the Appendix, *infra*, pp. 36–40.

QUESTIONS PRESENTED

1. Having found that the employer in this case unlawfully supported and assisted District 50, the Board issued its customary order directing that the employer, *inter alia*, withhold recognition from that union unless and until it was certified by the Board as the bargaining representative of the employees. The first question presented is whether this remedy is rendered inappropriate because the union's refusal to comply with the filing requirements of Section 9 (f), (g) and (h) makes it currently ineligible for certification.

2. Whether, assuming that the Board's order was in excess of its authority, the court of appeals erred in rewriting the order instead of remanding the case to the Board.

3. Whether the court below improperly interfered with the agency's discretion to fashion its remedy by eliminating from the Notice prescribed by the Board all references to the Teamsters Union, which had been disadvantaged by the employer's several unfair labor practices.

conceives has been imposed upon it, stems from the union's failure to comply with the statutory filing requirement—a disability which lies within the union's own power to remove.

B. THE DECISION BELOW

The court below unanimously sustained the Board's findings and conclusions with respect to Bowman's unfair labor practices and illegal support to District 50 as "clearly" evidenced by the record. The court, however, with Judge Washington dissenting, held that the Board lacked authority to require that Bowman withhold recognition from District 50 unless and until that union was certified by the Board (R. 50–53). The majority's view was that this Court's decision in *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U. S. 62, 71–72, precluded the Board from making certification a prerequisite to recognition (R. 53–54). Accordingly, the court directed that the Board's order be modified, insofar as Bowman was required to withhold statutory recognition from District 50 unless and until that union was certified, by adding the phrase "or shall have been freely chosen as such [statutory representative] by a majority of the employees after all effects of unfair labor practices have been eliminated" (R. 54, 57, 66–67). In so doing the majority indicated that, in its view, the ill effects of the unfair labor practices would be removed by Bowman's compliance with the remaining terms of the Board's order, including the posting of notices for 60 days (R. 54–55).

In addition, the court below modified the Notice prescribed by the Board by deleting from its terms all

union, that the Board's order "is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act" and the order accordingly "should stand." *Virginia Electric & Power Co* v. *National Labor Relations Board*, 319 U. S. 533, 540. Moreover, to permit a noncomplying union, as results from the decision below, to enjoy an advantage denied complying unions by the Act would tend to frustrate the Congressional purpose underlying Section 9 (f), (g) and (h) and would lend encouragement to noncompliance.

The contrary view of the court below finds no support in the decision of this Court in *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U. S. 62. Indeed, the holding that a noncomplying union need not necessarily establish its representative status through a Board election was there premised upon the unquestioned assumption that the union, unlike here, was the freely chosen agent of employees uninfluenced by employer unfair labor practices.

Nor can the respondent union show, as it claims, that the Board's order is "penal" rather than "remedial." In adopting a measure uniformly applied to remedy like employer misconduct, the Board has added no special liability because of respondent's noncomplying status; rather, it has merely refused to discriminate in favor of respondent or any other noncomplying union. Moreover, since the Board's order is designed and necessary to restore to the employees complete freedom of choice, the "injury" claimed by respondent is at best "merely an incidental effect of an order which in other respects effectuates the poli-

unfair labor practices proscribed by the Act "to cease and desist from such unfair labor practice, and to take such affirmative action * * * as will effectuate the policies of this Act." The power thus delegated to the Board is a broad discretionary one. In selecting the appropriate remedy for a given unfair labor practice, the Board is not bound to choose that which may subsequently appear most desirable to the courts. For, as this Court has frequently observed, "[t]he Board not the courts determines under this statutory scheme how the effect of unfair labor practices may be expunged." *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584, 600. As this Court has many times pointed out, "the relation of remedy to policy is peculiarly a matter for administrative competence" and "courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy." *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, 194; *International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 82; *National Labor Relations Board* v. *Gullet Gin Company*, 340 U. S. 361, 363; *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584, 600.

In the exercise of this authority the Board in the instant case directed the employer to withhold recognition from the unlawfully assisted union unless and until the affected employees should designate it as their bargaining representative in a secret ballot election conducted under Board safeguards. The remedy adopted here has been repeatedly applied by the

organization so "corrupted" by employer domination, support, and interference as to be inherently incapable of ever affording employees "an agency for collective bargaining." *National Labor Relations Board* v. *Pennsylvania Greyhound Lines*, 303 U. S. 261, 268, 271. Concurrently, the Board recognized that where a union could be purged of employer influence, as, for example, in the case of a union affiliated with a national labor organization, its disestablishment would forever deprive employees of an agent which, if freely chosen, was potentially capable of acting as their true representative. In order to afford workers the widest possible selection of bargaining agents, while at the same time insuring to them under appropriate safeguards a free choice to accept or reject a previously assisted organization, the Board throughout its history has adapted its remedy in these circumstances "to the situation which calls for redress" (*National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 348) by requiring that recognition be withheld from any supported union unless and until chosen in a Board conducted election.[5]

Such a provision appropriately serves to effectuate the policies of the Act. In predicating future recognition of an assisted union upon the "most reliable means of ascertaining the deliberate will of the employees"—i. e., an "election * * * conducted under

[5] This remedy apparently was first adopted in *Lenox Shoe Co.*, 4 NLRB 372, 388, and has since been repeatedly applied by the Board. See, *e. g.*, the following annual reports of the Board: Eighth (1943), p. 36; Thirteenth (1948), pp. 50–51; Twenty-First (1956), pp. 79–80.

proper safeguards" (*National Labor Relations Board* v. *Century Oxford Mfg. Corp.*, 140 F. 2d 541, 542–543 (C. A. 2)) the order is plainly designed to permit the employees to express their choice in an atmosphere as free of restraint and coercion as is possible. It is not always true, as the court below thought (R. 55), that "it may reasonably and safely be assumed that normaley has been restored" after appropriate compliance notices by the employer. Where the weight of an employer's economic power has been thrown behind a favored union so as to have coerced its majority acceptance, as here, the employer's mere cessation of like acts, withdrawal of recognition, and declaration of future neutrality, though of aid, will not necessarily suffice to wholly "dissipate the unwholesome effect of [his] violations of the Act" (*Franks Bros. Co.* v. *National Labor Relations Board*, 321 U. S. 702, 704). As this Court has recognized, in *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584, 600, when employees are solicited by a union so favored, there is no reason to "assume that [they] will be free from improper restraints" whatever has been their "employer's later show of impartiality." So long as public disclosure of their allegiance is thus compelled, workers may well hesitate to reject, through fear of reprisal, or may eagerly accept, through hope of individual gain, any union which their employer has favored.

The "advantageous anonymity of a * * * Board" election (*National Labor Relations Board* v. *Appalachian Electric Power Co.*, 140 F. 2d 217, 222 (C. A. 4)) is thus essential to neutralize the threat which a

previously assisted union, by merely continuing to exist on the organizational scene, inevitably presents to full freedom of employee choice. Though the employer engages in no further overt acts of interference, there is real danger that his past preference will continue effectively to deter employees from freely disclosing their wishes concerning representation to any union which they, with good reason, have identified with management.[6] Unless secrecy of voting is afforded at the crucial moment of choice, there can be no assurance that any majority status which the union thereafter obtains is premised on that full freedom of choice which the Act seeks to foster and secure. In these circumstances the "safeguards to voluntary choice," which is the indispensable condition for genuine collective bargaining, can only be provided by "the privacy and independence of the voting booth". (*Brooks* v. *National Labor Relations Board*, 348 U. S. 96, 99–100).[7]

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[6] See *National Labor Relations Board* v. *Pacific Greyhound Lines, Inc.*, 303 U. S. 272, 274–275; *Madden* v. *Brotherhood and Union of Transit Employees of Baltimore*, 147 F. 2d 439, 441 (C. A. 4); *Westinghouse Electric & Mfg. Co.* v. *National Labor Relations Board*, 112 F. 2d 657, 660, 661 (C. A. 2), affirmed, 312 U. S. 660; *Developments in the Law—The Taft-Hartley Act*, 64 Harv. L. Rev. 781, 822 (1951); *Disestablishment: NLRB's Waning Remedy and the International Unions*, 29 Ind. L. J. 219, 236 (1954).

[7] Accord: *National Labor Relations Board* v. *A. J. Tower Co.*, 329 U. S. 324, 332; *National Labor Relations Board* v. *Botany Worsted Mills*, 133 F. 2d 876, 881 (C. A. 3), certiorari denied, 319 U. S. 751; *National Federation of Railway Workers* v. *National Mediation Board*, 110 F. 2d 529, 533, 536–537 (C. A. D. C.), certiorari denied, 310 U. S. 628; *National Labor Relations Board* v. *J. I. Case Co.*, 201 F. 2d 597, 600 (C. A. 9); 18 Am. Jur., *Elections*, Secs. 212, 234.

That the Board's order is wholly appropriate and necessary to "translate into actuality the policies of the Act" (*Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, 188) finds confirmation in the legislative history, as well as other antecedents, of the Act. In framing the Wagner Act Congress clearly evidenced its intent that such remedial action be taken in meeting the problem of company supported or dominated unions. Citing the experience of the Board's immediate predecessor—the National Labor Relations Board acting under Section 7 (a) of the National Industrial Recovery Act—Senator Wagner and others throughout the hearings stressed that, if employees subjected to such influences were in fact to "ha[ve] a free choice" concerning their representation, it was of vital importance to hold secret ballot elections, supervised by an impartial governmental body in which "workers * * * felt that their identity was not to be disclosed and they would be protected from any reprisal."[8] Governmentally supervised elections were similarly viewed as necessary, where carriers had interfered in the selection of employee representatives by supporting and assisting unions, in determining representation questions arising under Section 7 (e) of the Emergency Railroad

[8] Hearings Before the Committee on Education and Labor on S. 2926, 73rd Cong., 2d Sess., pp. 13, 85, 146, 149, 207; Hearings Before the Committee on Education and Labor on S. 1958, 74th Cong., 1st. Sess., pp. 42, 98, 446–447; 79 Cong. Rec. 7659–7660; reprinted, respectively, in Legislative History of the National Labor Relations Act, 1935 (Govt. Print. Off., 1935), at pp. 43, 115, 176, 179, 237, 1418, 1474, 1832–1833, 2373–2374.

Transportation Act of 1933," to which Congress also looked as an authoritative precedent for the provisions of the original Act.[10] Indeed, the committee reports left no doubt concerning the propriety of like measures under the Act by citing, as illustrative of the broad power conferred upon the Board, the decree affirmed by this Court in *Texas & New Orleans R. Co. v. Brotherhood of Railway Clerks*, 281 U. S. 548.[11] A provision affording employees the opportunity to participate in a secret ballot election to be conducted under the supervision of the lower court itself in determining their future representation was there upheld, *inter alia*, as no more than was necessary for a "restoration of the *status quo*," even though, by the further terms of the decree, the unlawfully dominated union was disestablished and thus permanently removed from the organizational scene. 281 U. S. at 555–557. The committee's specific recognition of the provisions there approved as a means of affording

[9] Bulletin of the United States Bureau of Labor Statistics No. 634, *Characteristics of Company Unions, 1935*, p. 223, (1937).

[10] Report of Senate Committee on Education and Labor, Rept. No. 573, 74th Cong., 1st Sess., pp. 9–10; Report of House Committee on Labor, Rept. No. 972, 74th Cong., 1st Sess., pp. 15–16, reprinted in Legislative History of the National Labor Relations Act, 1935, *supra*, at pp. 2308–2310, 2971–2972.

[11] Report of Senate Committee on Education and Labor, Rept. No. 573, 74th Cong., 1st Sess., pp. 9, 17; 79 Cong. Rec. 8658, reprinted in Legislative History of the National Labor Relations Act, 1935, *supra*, at pp. 2308, 2317, 3008. That Congress intended to integrate into the statutory scheme "the policy of the Railway Labor Act," particularly as set out by the decision of this Court in "the *Railway Clerks* case," is clear. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines*, 303 U. S. 261, 266–267. And see *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, 188, n. 6.

"employees * * * free choice" (fn. 11, *supra*) following violations of Section 8 (2) is substantial evidence that the like remedy devised here by the Board is "of a kind contemplated * * * in the enactment of § 10 (*c*)" and well "within its terms." *National Labor Relations Board* v. *Pennsylvania Greyhound Lines*, 303 U. S. 261, 268.

In the course of adopting the 1947 ("Taft-Hartley") amendments to the Act, Congress again manifested its approval of the remedy here under review. Making clear that it had no more solicitude for company supported or dominated unions than before, Congress specifically rejected all attempts to amend Section 8 (2) of the original Act and carried its proscriptions over unchanged in Section 8 (a) (2) of the amended Act.[12] Congress studied in great detail the remedial policy which the Board had followed in cases of unlawful employer support or domination and evidenced its complete satisfaction with the measure here adopted; it differed only with the Board's practice of not allowing unaffiliated unions the same opportunity to reestablish their majority status by participating in a Board election as was afforded those unions affiliated with a national or international organization.[13] Thereafter, in its final report, the Joint

[12] See S. Rept. No. 105, 80th Cong., 1st. Sess., p. 12; 93 Cong. Rec. 6443, 4196, A-2253, reprinted in Legislative History of the Labor Management Relations Act, 1947 (Govt. Printing. Off., 1948), at pp. 418, 1539, 1103, 1525.

[13] See H. Rept. No. 245, 80th Cong., 1st Sess., pp. 28-29, 38, 42; S. Rept. No. 105, 80th Cong., 1st Sess. 3, 12-13, 25, 26; H. Conf. Rept. No. 510, 80th Cong., 1st Sess., pp. 40-41, 54-55, reprinted in Legislative History of the Labor Management Relations Act, 1947, supra, at pp. 319-320, 329, 333, 409, 418-419, 431,

Committee of Congress, specifically created to oversee the operation of the amended Act, similarly showed awareness of this remedial measure. It noted with approval that the amendments to Section 9 (c) (2) and 10 (c) of the original Act, requiring that in cases involving violations of Section 8 (a) (1) and (2) the same regulations and rules of decision shall apply to all unions without regard to their affiliated status, had been effectuated by the Board's revision of its practice so as to disestablish all dominated unions and permit all illegally supported unions to regain representative status following a Board election resulting in their certification. Report of the Joint Committee on Labor-Management Relations, S. Rept. No. 986, Part 3, 80th Cong., 2d Sess., pp. 67–68, 99–100.[14]

The uniform judicial construction given to both the original and the amended Act fully accords with

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432, 544–545, 558–559. See also the statements in this connection by Senators Taft, Ball, Smith, Ellender, and Murray, all members of the Senate Labor Committee, at 93 Cong. Rec. 3838, 4029–4030, 4137, 4143, 4196, 4283, 5015, A–2253, 6444, 6504, 6506, reprinted in Legislative History of the Labor Management Relations Act, 1947, *supra*, at pp. 1013–1014, 1036–1037, 1066–1067, 1077, 1103, 1149, 1498, 1525, 1541, 1582, 1584–1585.

[14] Consonant with Sections 9 (c) (2) and 10 (c) as amended, the Board has wholly abandoned its former policy and has consistently directed the disestablishment of any affiliated, as well as unaffiliated, union which it finds to have been employer dominated. National Labor Relations Board Thirteenth Annual Report, (1948) pp. 50–51; *National Labor Relations Board* v. *Jack Smith Beverages, Inc.*, 202 F. 2d 100, 101–102 (C. A. 6), certiorari denied, 345 U. S. 995; *National Labor Relations Board* v. *Polynesian Arts, Inc.*, 209 F. 2d 846, 847 (C. A. 6).

these consistent manifestations of Congressional intent. Apart from the opinion below, every court of appeals which has considered the problem has approved the Board's remedy as wholly appropriate to dissipate the effects of unlawful employer assistance and support and to insure a "free choice."[15] As stated by the Eighth Circuit in *Elastic Stop Nut Corp.* v. *National Labor Relations Board*, 142 F. 2d 371, certiorari denied, 323 U. S. 722, in upholding an order identical to that at bar (142 F. 2d at p. 380):

> The immediate object of a proceeding before the Board is to prevent unfair labor practices which tend to thwart the policy of the Act by interfering with the freedom of the employees to designate bargaining representatives of their own choice. Under sec. 10 (c) of the Act * * * the Board is given authority to take such affirmative remedial action as will effectuate the

[15] See, *e. g.*, *National Labor Relations Board* v. *La Salle Steel Co.*, 178 F. 2d 829, 835–836 (C. A. 7), certiorari denied, 339 U. S. 963; *Elastic Stop Nut Corp.* v. *National Labor Relations Board*, 142 F. 2d 371, 380 (C. A. 8); *National Labor Relations Board* v. *Parker Bros. & Co.*, 209 F. 2d 278, 279, 280 (C. A. 5); *National Labor Relations Board* v. *Braswell Motor Freight Lines*, 209 F. 2d 622, 624, 625 (C. A. 5); *National Labor Relations Board* v. *Wemyss*, 212 F. 2d 465, 473–474 (C. A. 9); *Independent Employees Ass'n.* v. *National Labor Relations Board*, 158 F. 2d 448, 456–457 (C. A. 2), certiorari denied, 333 U. S. 826; *National Labor Relations Board* v. *Norfolk Shipbuilding & Drydock Corp.*, 172 F. 2d 813, 816 (C. A. 4); *National Labor Relations Board* v. *John Engelhorn & Sons*, 134 F. 2d 553, 558 (C. A. 3); *Warehousemen's Union* v. *National Labor Relations Board*, 121 F. 2d 84, 92–93 (C. A. D. C.), certiorari denied, 314 U. S. 674. See also *District 50 United Mine Workers* v. *National Labor Relations Board*, 234 F. 2d 565, 571 where the Fourth Circuit recognized that the Board's order would be appropriate if applied to a complying union.

> purpose of the Act, and this extends to the power to take appropriate steps to nullify the effect of the employer's illegal conduct and prevent its enjoyment of any advantage gained thereby, for, unless the effect of the unfair labor practices is completely neutralized, there is no assurance that restraint is no longer present and that freedom of choice is guaranteed.

In sum, in providing for an election under Board safeguards in which employees may accept or reject any union which has been the beneficiary of unlawful employer assistance and support, the Board's remedy goes no further than is necessary to restore complete freedom of choice. See Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 Harv. L. Rev. 1, 9, 23 (1947).

B. THE PROPRIETY OF THE BOARD'S ORDER IS NOT LESSENED BY THE FACT THAT THE UNLAWFULLY ASSISTED UNION IS NOT IN COMPLIANCE WITH SECTION 9 (f), (g) AND (h)

Relying upon the Court's decision in *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U. S. 62, the court below concluded that the Board lacked power to condition the future recognition of an illegally assisted union upon a Board election and certification. While the instant case involves a noncomplying union which, for that reason, is ineligible for a Board certification as long as it remains out of compliance, the court below does not make clear whether, in its view, the Board's remedy is invalid as applied to all unlawfully assisted unions, whether or not the union in question has met the statutory filing requirements. Whatever the scope of the decision below, we

think that the court's reliance on *Arkansas Oak Flooring* is misplaced and, further, that the considerations which we have set forth *supra*, pp. 13–22, in support of the Board's remedy apply as much to an illegally assisted noncomplying union as to a complying union. Indeed, if a distinction were to be drawn between the two, and the remedy held valid as to a complying union but not as to a noncomplying union, the anomalous result would be that noncompliance entitles the illegally assisted union to special treatment.

1. In *Arkansas Oak Flooring, supra,* this Court held that the preemptive scope of the federal Act does not turn upon the union's compliance with the filing requirements and rejected the contention that picketing for recognition by a noncomplying union which was ineligible for Board certification as bargaining representative was illegal and therefore subject to state restraints. In arriving at this conclusion the Court stressed, *inter alia,* that the representative status of a bargaining agent under the Act need not necessarily be established through a Board election and certification and that an employer may recognize a noncomplying union if a majority of the employees have authorized it to serve as their representative. This observation was premised, however, upon the basic and unquestioned assumption that the union had not been tainted with unlawful employer support and was in fact the freely chosen agent of the employees. 351 U. S. at 69, 74–75. But it is an altogether different matter where, as here, the union has been the willing beneficiary of the employer's unfair labor practices and owes its status in some measure to illegal support. Where

such support and interference has influenced the employees' choice, as it manifestly did here, the Act vests power in the Board, regardless of the employees' wishes, "to select the method of determining what union, if any, employees desire as a bargaining agent". *National Labor Relations Board* v. *Falk Corporation*, 308 U. S. 453, 458.[16] And for the reasons already stated, a secret election conducted under appropriate safeguards is best calculated to neutralize the effects of such employer assistance and restore to the employees the freedom of choice which is lawfully theirs.

The union's noncompliance and its consequent ineligibility for Board certification as long as it remains out of compliance does not render the Board's choice of remedies any less necessary or appropriate. As the Court observed in *Arkansas Oak Flooring*, a union by electing not to comply with the statutory filing requirements does not "eliminate the applicability of the * * * Act" nor "exempt itself from other applicable provisions." (351 U. S. at 70, 74.) Such applicable provisions include Section 10 (c) which, as this Court has long held, entrusts to the Board's "expert judgment" the determination of "how the effect of prior unfair labor practices may be expunged" so as to restore "the

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[16] Accord: *National Labor Relations Board* v. *Newport News Shipbuilding & Dry Dock Co.*, 308 U. S. 241, 251; *National Labor Relations Board* v. *Southern Bell Telephone Co.*, 319 U. S. 50, 59–60; *National Labor Relations Board* v. *Automotive Maintenance Machinery Co.*, 315 U. S. 282, reversing, 116 F. 2d 350, 355–356 (C. A. 7); *National Labor Relations Board* v. *Red Arrow Freight Lines, Inc.*, 180 F. 2d 585, 586–587 (C. A. 5), certiorari denied, 340 U. S. 823; *Donnelly Garment Co.* v. *National Labor Relations Board*, 165 F. 2d 940, 942 (C. A. 8).

freedom of choice guaranteed to the employees by the Act." *International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 82. The noncomplying status of an assisted union obviously affords the Board no reason to believe that employer preference has had any the less "telling effect" (*ibid.* at 78) upon employees or that, absent the safeguards of a Board election, they will be any less subject to a continuing restraint in the future.

Indeed, in the case of a noncomplying union there is, perhaps, an even greater need for the Board's order. The decision below, as we have stated, leaves it to the offending employer and the assisted union to determine that "normalcy" has been restored and that the employees have regained their freedom of action. But if the matter is left to them, there is a serious risk that the effects of the employer's illegal assistance will be perpetuated, with the consequent impairment of the employees' freedom of choice. The employer, on the one hand, is naturally predisposed to deal with the union which has been the recipient of his favors, in preference to other and perhaps more vigorous rival unions. The union, on the other hand, by reason of its noncompliance may be disposed to permit, or acquiesce in, continuing employer influence in order to gain or retain recognition. Though of "no value as a bargaining point" insofar as a complying union with a right enforceable by law is concerned, employer recognition has assumed especial "importance and value" to those unions foreclosed from invoking Board processes to protect their status. Kearns, *Non-Communist Affi-*

davits Under the Taft-Hartley Act, 37 Geo. L. J. 297, 304 (1949). For this reason, as has been recognized, such unions "in many instances will be amenable to moderate concessions" in order to gain or insure continued recognition.[17] With these factors operating, the safeguards of a Board election are particularly appropriate to insure that the Act is not "evaded by indirections or formal observances which in fact defy it." *National Labor Relations Board* v. *Express Publishing Co.*, 312 U. S. 426, 436–437.

Moreover, to exempt the noncomplying union from establishing its status in a Board-conducted election would accord it preferential treatment over a complying union. It would be wholly paradoxical to afford such unions a more favored position than is accorded to complying unions. While the Act does not illegalize the activities of noncomplying unions, the fact is that in enacting Section 9 (f), (g) and (h) and thereby precluding access to Board process to such unions, Congress sought to "make it difficult for" such unions "to remain effective." *American Communications Association* v. *Douds*, 339 U. S. 382, 389–390.[18] In the light of this Congressional attitude

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[17] S. Rept. No. 374, Views of Certain Members of the Joint Committee on Labor-Management Relations, 81st Cong., 1st Sess., pp. 13–14. Accord: Kearns, *Non-Communist Affidavits Under the Taft-Hartley Act*, 37 Geo. L. J. 297, 304 (1949); Greenwald, *Non-Communist Affidavits: Taft-Hartley Sound and Fury*, 12 La. L. Rev. 407, 419, n. 43 (1952); Scanlan, *The Communist Dominated Union Problem*, 28 Notre Dame Law, 458, 464–465 (1953); *Disestablishment: NLRB's Waning Remedy and the International Unions*, 29 Ind. L. J. 219, 233 (1954).

[18] See also, *Fay* v. *Douds*, 172 F. 2d 720, 724 (C. A. 2); Cox, *Some Aspects of the Labor Management Relations Act 1947*, 61

and the serious disabilities imposed by the Act for noncompliance, there is, as Judge Washington stated (R. 59), "no basis in principle for giving a non-complying union an advantage which complying unions do not have. In practice to do so may encourage unions not to comply with the Act"—a result wholly at odds with the Congressional purpose underlying Section 9 (f), (g) and (h). Accordingly, the Board's order is necessary "to give coordinated effect to the policies of the Act" (*National Labor Relations Board* v. *Seven-Up Bottling Co. of Miami, Inc.*, 344 U. S. 344, 348).[19]

Finally, still another factor militates against the correctness of the ruling below. As this Court has noted, "compliance at a given moment, or continuous compliance [is] a matter of happenstance." *National Labor Relations Board* v. *Dant & Russell*, 344 U. S. 375, 383. If the validity of the Board's order turns upon this "matter of happenstance," then it might

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Harv. L. Rev. 1; 35-36; Kearns, *Non-Communist Affidavits Under the Taft-Hartley Act*, 37 Geo. L. J. 297, 301-302, 305 (1949); *Developments in the Law—The Taft-Hartley Act*, 64 Harv. L. Rev. 781, 793-794 (1951).

[19] As noted in *Arkansas Oak Flooring*, *supra*, at p. 70, n. 5, the Board has consistently held that noncomplying unions have no "power to immunize themselves against decertification proceedings by their very refusal to" file the affidavits which the Act requires since according such unions a more favored position than that of complying unions under the Act would lend "[e]ncouragement * * * to noncompliance." *Harris Foundry & Machine Co.*, 76 NLRB 118, 120. For Congressional awareness and approval of the Board's rationale, see Report of the Joint Committee on Labor-Management Relations, S. Rept. No. 986, Pt. 1, 80th Cong., 2d Sess., pp. 14, 33, and Pt. 3, 80th Cong., 2d Sess., pp. 39-40, 45.

follow that the order may be invalid when issued because the union is then out of compliance but thereafter validated in the event that the union elects to comply. Or, to put the reverse case, the union's subsequent noncompliance following issuance of the order might have the effect of invalidating it. These incongruous consequences furnish an additional reason for holding that "noncompliance * * * should not work to frustrate the Act's purpose of remedying unfair labor practices" (*Dant & Russell, supra,* at 383–384) through remedies which are otherwise valid and appropriate.

The respondent union further suggests that since it is free to comply or not with the filing requirements of Section 9 (f), (g) and (h), the Board's order, which in effect requires it to comply if it wishes to gain recognition as the employees' bargaining representative, is of a "penal" rather than a "remedial" character, and is therefore beyond the scope of the Board's authority. But, as this Court has said, it is best "to avoid entering into the bog of logomachy, as we are invited to, by debate about what is 'remedial' and what is 'punitive.' It seems more profitable to stick closely to the direction of the Act by considering what order does, as this does, and what order does not, bear appropriate relation to the policies of the Act." *National Labor Relations Board* v. *Seven-Up Bottling Co. of Miami, Inc.,* 344 U. S. 344, 348. In adopting a measure uniformly applied to remedy like employer misconduct, the Board has added no special liability because of respondent's noncomplying status; it has merely refused, as the dissenting opinion below noted

(R. 58–59), to discriminate in favor of respondent or other noncomplying unions by giving them an advantage over those unions choosing to comply. If the requirement of a Board election is remedial and valid insofar as a complying union is concerned and bears appropriate relation to the policies of the Act, then it is not easy to understand why the same requirement in the case of a noncomplying union is penal and invalid.

To be sure, if the respondent union persists in refusing to comply with the filing requirements, it may not gain recognition from the employer as the employees' bargaining representative even if the employees continue to favor it. But the position in which the union thus finds itself stems from its own participation in the unfair labor practices committed here and its willing acceptance of illegal employer support. Moreover, the union can readily extricate itself from this predicament by complying with the Act and thus put itself into a position where it may invoke the Board's process for the determination of its status.[20]

An even more basic answer, however, is that respondent's argument totally misconceives the nature of the Board's order. The Board is not concerned here with punishing or with effecting an alteration in

[20] That the latter course is open to respondent clearly appears from the testimony of John L. Lewis in Hearing Before the Committee on Labor and Public Welfare, U. S. Senate, Pt. 4, 83rd Cong., 1st Sess., pp. 1908, 1920. Nor is this course foreclosed in the case of any noncomplying union since its members are free to divest themselves, as the Act intends, of any officer not willing to file the affidavits there required. See *American Communications Association* v. *Douds*, 339 U. S. 382, 390, 412.

the position of this or any noncomplying union; rather, the Board is solely concerned with restoring the *status quo* so that the employees may "have the complete and unhampered freedom of choice," in the selection of their bargaining representative, "which the Act contemplates." *International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 80. The "injury" claimed by respondent thus at best would "be merely an incidental effect of an order which in other respects effectuates the policies of the federal Act." *National Labor Relations Board* v. *Gullett Gin Co.*, 340 U. S. 361, 365.

II. EVEN IF THE BOARD'S ORDER WERE INVALID, THE COURT BELOW ERRED IN PRESCRIBING ITS OWN REMEDY INSTEAD OF REMANDING THE CASE TO THE BOARD.

In addition to holding the Board's order improper, the court below, as stated above, p. 6, prescribed an amendment to the order and entered a decree enforcing the order as amended. The amendment in substance permits the employer to recognize the Union after compliance with the other provisions of the Board's order and after notices have been posted for 60 days (R. 54–55, 57, 66–67). In thus rewriting the order to prescribe its own remedy for the unfair labor practices here committed, without affording the Board an opportunity to consider alternative remedies, the court below "usurped an administrative function" (*Federal Power Commission* v. *Idaho Power Co.*, 344 U. S. 17, 20). As this Court has emphasized, "the relation of remedy to policy is peculiarly a matter for

administrative competence * * *." *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, 194.[21] The Board believes, correctly we think, that its certification is an indispensable condition to future recognition of an illegally assisted union; however, if that view is rejected, the Board may perhaps devise other measures which will enable it to make certain that the employees' choice of bargaining representative is in fact made in an atmosphere free of restraint and coercion and which do not leave that determination, as the decision below in effect does, to the employer and the assisted union.[22] Accordingly, if the Court should disagree with our views as to the validity of the Board's present order, we think that orderly administration of the Act, with due regard to the respective functions of the Board and reviewing courts, would suggest a remand of this case to the Board for the purpose of considering alternative remedies. *Federal Power Commission* v. *Idaho Power Co.*, 344 U. S. 17, 20–21. And see, *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U. S. 80, 88,

[21] Accord: *National Labor Relations Board* v. *Seven-Up Bottling Co. of Miami, Inc.*, 344 U. S. 344, 346; *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584, 600, and cases cited.

[22] To suggest a possible alternative course, without prejudging its legality or its acceptability to the Board, the Board might conduct an election among the employees and certify the union if it wins the election provided it is in compliance but otherwise certify only the arithmetical results. See *Harris Foundry & Machine Co.*, 76 NLRB 118; *Bethlehem Steel Co.*, 79 NLRB 1271; but cf. *Herman Loewenstein, Inc.*, 75 NLRB 377; *Darling and Company*, 116 NLRB 374.

94–95. *American Newspaper Publishers Association* v. *National Labor Relations Board*, 190 F. 2d 45, 48–49 (C. A. 7), certiorari denied, 344 U. S. 812; *National Labor Relations Board* v. *Thayer Co.*, 213 F. 2d 748, 755 (C. A. 1), certiorari denied, 348 U. S. 883.

III. THE COURT BELOW FURTHER ERRED IN MODIFYING THE NOTICE PROVISION OF THE BOARD'S ORDER

The court below also modified the Board's order by striking from the Notice to be posted by the Company all references to the Teamsters Union, which, as the Board and the court found, was the prime target of the unfair labor practices here committed (R. 55–57, 66–68). No contention concerning the propriety of the Notice in this respect was ever raised by the parties before the Board or before the court below (*supra*, p. 4). We submit that Section 10 (e) of the Act, which provides that "[n]o objection that has not been urged before the Board * * * shall be considered by the court" (in the absence, as here, of any extraordinary circumstances) as well as settled principles of law clearly precluded independent review of the Board's notice requirements by the court below. *National Labor Relations Board* v. *Cheney California Lumber Co.*, 327 U. S. 385, 388–389; *Marshall Field & Co.* v. *National Labor Relations Board*, 318 U. S. 253, 255; *National Labor Relations Board* v. *Seven-Up Bottling Co. of Miami, Inc.*, 344 U. S. 344, 350. See also *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U. S. 492, 493–494, 498–499.

The Notice prescribed by the Board is in any event manifestly proper. As this Court has long made clear, it is "within the authority conferred on the

Board by § 10 (c) of the Act" to require an announcement informing employees, as here, that their employer will forswear precisely those unlawful acts from which he "is ordered to cease and desist." *National Labor Relations Board* v. *Express Publishing Co.*, 312 U. S. 426, 438–439. In order to give public assurances to employees of their complete freedom to join any union in which membership has been specifically discouraged by their employer, the Board has directed that such organizations be named in the employer's pledges of non-interference since its earliest days, with the approval of this Court and the courts of appeals generally.[23] The suggestion of the court below that a like requirement here might "indicate that the Board prefers" the union so disfavored (R. 55) has hitherto been rejected as wholly without merit;[24] and it is further negated by the Notice itself,

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[23] See *Jones & Laughlin Steel Corp.*, 1 NLRB 503, 518, affirmed, 301 U. S. 1, 49, and enforced, 90 F. 2d 678, 679 (C. A. 5); *Mackay Radio & Telegraph Co.*, 1 NLRB 201, 235, cited at 87 F. 2d 611, 612 (C. A. 9), and affirmed, 304 U. S. 333, 341, 343, 348; *H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U. S. 514, 522. And see also *National Labor Relations Board* v. *Harbison-Walker Refractories Co.*, 135 F. 2d 837, 839–840 (C. A. 8); *National Labor Relations Board* v. *Standard Oil Co.*, 142 F. 2d 676, 677 (C. A. 6), certiorari denied, 323 U. S. 791; *National Labor Relations Board* v. *Moore-Lowry Flour Mills Co.*, 122 F. 2d 419, 429 (C. A. 10), enforcing 21 NLRB 1040, 1057–1058; *Butler Brothers* v. *National Labor Relations Board*, 134 F. 2d 981, 985 (C. A. 7), certiorari denied, 320 U. S. 789; *National Labor Relations Board* v. *Weirton Steel Co.*, 135 F. 2d 494, 499 (C. A. 3).

[24] *National Labor Relations Board* v. *Clark Phonograph Record Co.*, 176 F. 2d 341, 344 (C. A. 3), citing, as holding to the same effect, *National Labor Relations Board* v. *Arton Studios, Inc.*, 168 F. 2d 521 (C. A. 3) (*per curiam*); *National Labor*

which expressly assures employees that they are free to join or not to join the "Teamsters" or "any other labor organization" (R. 39–40). Indeed, as the court below has itself stated in another case approving identical provisions of a Board order issued in like circumstances: "References in the Board's order to certain labor organizations by name are not understood by us to require or even to intimate that those organizations or organizations of that type must be chosen or are to be given any preference whatsoever over any other organization by the [Company] employees," nor, "as we read the Board's order," does it make any attempt to "dictate to employees what labor organization shall represent them." *Aerovox Corporation* v. *National Labor Relations Board*, 211 F. 2d 640, 641 (C. A. D. C.), certiorari denied, 347 U. S. 968.

Relations Board v. *Baldwin Locomotive Works*, 128 F. 2d 39, 51 (C. A. 3). And see *National Labor Relations Board* v. *Brown Paper Mill Co.*, 198 F. 2d 867, 872 (C. A. 5), certiorari denied, 310 U. S. 651.

CONCLUSION

For the reasons stated, the judgment below should be reversed and the case should be remanded with directions to enforce the Board's order.

Respectfully submitted.

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OCTOBER 1957.

APPENDIX.

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it * * *.

* * * * *

REPRESENTATIVES AND ELECTIONS

SEC. 9. * * *

(c) * * * (2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the

persons filing the petition or the kind of relief sought, and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10 (c).

* * * * * *

(f) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless such labor organization and any national or international labor organization of which such labor organization is an affiliate or constituent unit (A) shall have prior thereto filed with the Secretary of Labor copies of its constitution and bylaws and a report, in such form as the Secretary may prescribe, showing—

(1) the name of such labor organization and the address of its principal place of business;

(2) the names, titles, and compensation and allowances of its three principal officers and of any of its other officers or agents whose aggregate compensation and allowances for the preceding year exceeded $5,000, and the amount of the compensation and allowances paid to each such officer or agent during such year;

(3) the manner in which the officers and agents referred to in clause (2) were elected, appointed, or otherwise selected;

(4) the initiation fee or fees which new members are required to pay on becoming members of such labor organization;

(5) the regular dues or fees which members are required to pay in order to remain members in good standing of such labor organization;

(6) a detailed statement of, or reference to provisions of its constitution and bylaws showing the procedure followed with respect to, (a) qualification for or restrictions on membership,

(b) election of officers and stewards, (c) calling of regular and special meetings, (d) levying of assessments, (e) imposition of fines, (f) authorization for bargaining demands, (g) ratification of contract terms, (h) authorization for strikes, (i) authorization for disbursement of union funds, (j) audit of union financial transactions, (k) participation in insurance or other benefit plans, and (l) expulsion of members and the grounds therefor;

and (B) can show that prior thereto it has—

(1) filed with the Secretary of Labor, in such form as the Secretary may prescribe, a report showing all of (a) its receipts of any kind and the sources of such receipts, (b) its total assets and liabilities as of the end of its last fiscal year, (c) the disbursements made by it during such fiscal year, including the purposes for which made; and

(2) furnished to all of the members of such labor organization copies of the financial report required by paragraph (1) hereof to be filed with the Secretary of Labor.

(g) It shall be the obligation of all labor organizations to file annually with the Secretary of Labor, in such form as the Secretary of Labor may prescribe, reports bringing up to date the information required to be supplied in the initial filing by subsection (f) (A) of this section, and to file with the Secretary of Labor and furnish to its members annually financial reports in the form and manner prescribed in subsection (f) (B). No labor organization shall be eligible for certification under this section as the representative of any employees, and no complaint shall issue under section 10 with respect to a charge filed by a labor organization unless it can show that it and any national or international labor organization of which it is an affiliate or constituent unit has complied with its obligation under this subsection.

(h) No investigation shall be made by the Board of any question affecting commerce con-

cerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits.

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. * * *

* * * * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * * *And provided further*, That in determining whether a complaint shall issue alleging a violation of section 8 (a) (1) or section 8 (a) (2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not

The Board order in the instant case does not fit the facts of the particular situation being dealt with by it. See *Williams Motor Co.* v. *National Labor Relations* Board, 128 F(2d) 960 at 965.

D. The Order of the Board Was Punitive

The Board order penalizes District 50 by depriving it of the right of election to file or not to file, afforded it by the Act.

It is submitted that the Labor Board has no punitive powers. Its powers are remedial only. See *N.L.R.B.* v. *Flotill Products, Inc.*, 180 F(2d) 441 (C.A. 9).

In the language of Mr. Justice Roberts: "Section 10(c) was not intended to give the Board power of punishment or retribution for past wrongs or errors. Action under that Section must be limited to the effectuation of the policies of the Act." *National Labor Relations Board* v. *Newport News Shipbuilding and Dry Dock Company*, 308 U.S. 241 at 250.

The Board cannot impose sanctions not covered by the Act. See *Leedom* v. *International Union*, 352 U.S. 145, and *Meat Cutters* v. *Labor Board*, 352 U.S. 153.

The order cannot be justified by orders in the case of a dominated union. In such case the employer sets up a mechanism to thwart the basic purpose of the Labor Management Relations Act of 1947, as amended. There is no freedom of choice in a dominated union. There is no collective bargaining between the employer and a representative freely chosen by his employees when the union speaking for the employees is a mere creature of the employer. It amounts to no

ployees to bargain collectively through representatives of their own choosing. Section 10 (c) of the Act confers remedial power upon the Board, "to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this sub-chapter."

The language of Mr. Justice Stone in *National Labor Relations Board* v. *Pennsylvania Greyhound Lines*, 303 U.S. 261 at 267 is: "To secure to employees the benefits of self-organization and collective bargaining through representatives of the employees' own choosing, the Board was authorized by Section 10 (c) to order the abandonment of unfair labor practices and to take affirmative action which would carry out the policy of the Act."

The "unless and until" certified form of order deprives the employees of the rights guaranteed them under the Act, and the union the right of representation given it under the Act.

C. The Order of the Board Was Not an Appropriate Order

Mr. Chief Justice Stone, in *National Labor Relations Board* v. *Pennsylvania Greyhound Lines*, supra, quoted from the Report of the House Committee on Labor, H. R. 1147, 74th Cong., 1st Sess., p. 3 as follows: "The orders will, of course, be adapted to the need of the individual case." (p. 268)

The Board must order an appropriate remedy in order to obtain enforcement from the Court of Appeals. See *National Labor Relations Board* v. *Bradford Dyeing Association*, 310 U.S. 318 at 342.

Poultry Corp. v. *U. S.*, 295, U.S. 495, the Board cannot usurp legislative power. See too *Panama Refining Company* v. *Ryan*, 293 U.S. 388.

This court announced in *Colgate-Palmolive-Peet Co.* v. *N.L.R.B.*, 338 U.S. 355 at 363: "It is not necessary for us to justify the policy of Congress. It is enough that we find it in the statute. That policy cannot be defeated by the Board's policy, which would make an unfair labor practice out of that which is authorized by the Act. The Board cannot ignore the plain provisions of a valid contract made in accordance with the letter and the spirit of the statute and reform it to conform to the Board's idea of correct policy. To sustain the Board's contention would be to permit the Board under the guise of administration to put limitations in the statute not placed there by Congress."

The order complained of is compulsion by indirection. The Congress carefully refrained from making the filing compulsory. Evidently the sponsors of the Act did not dare to go that far. The Labor Board now through the device of an order valiantly seeks to do that which Congress was unwilling to do.

B. The Order of the Board Violates the Policy of the United States

The policy of the United States is in the last paragraph of Section 1 of the Act declared to be the protection of "the exercise by workers of full freedom of association, self-organization and designation of representatives of their own choosing." Section 7 further implements the freedom guaranteed the em-

and dealing with District 50 "unless and until it shall be certified as such representative by the Board" are in agreement that such an order should not be allowed to stand.

The *Wemyss* case, 212 F(2d) 465, referred to by Washington, J., in his dissenting opinion, was decided before this court handed down its opinion in the *Arkansas Oak Flooring* case. Furthermore, that case deals with a contract containing a union security provision which, under Section 8 (a) (3) of the Act, cannot be entered into unless the employer has received from the Board a notice of compliance with Section 9 (f), (g) and (h). Insofar as we can determine from the opinion, the arguments we advanced in the court below were not made in the *Wemyss* case.

It seems clear that the effect of an "unless and until" certified order as applied to unions which do not file under Section 9 (f), (g) and (h) is to work an administrative amendment to an Act of Congress.

Let us suppose the National Labor Relations Board promulgated a rule or regulation as follows: "Hereafter all unions must file the reports and affidavit designated in Section 9 (f), (g) and (h) in order to be able to act as the representative of the majority of employees." It would be instantly apparent that such a rule or regulation is an usurpation of the legislative function. If Congress cannot delegate a legislative power to the Chief Executive, as held in the case of *A. L. A. Schechter*

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start upon another device and stratagem to escape the dictates of the law. The Board called it a Notice to Show Cause why it should not make application to that court for permission to dismiss the complaint. This after years of litigation.

2. In support of its application to the Board for modification of its order by deleting Paragraphs 1(d) banning recognition of District 50 and 2(c) dealing with District 50 "unless and until the said labor organization shall have been certified as such representative by the Board," District 50 urged the two grounds set up at Page 4 in petitioner's statement, and additional grounds that the order: (2) was beyond the power of the Board; (4), (9) was a ban in perpetuity; (5), (6) and (7) set up a limitation of certification as a condition precedent to the right of representation; (8) cut off a right of representation unlawfully, and (11) in effect, was administrative legislation contrary to law. (R. 725-728)

REASONS FOR DENYING THE WRIT:

A. The Decision of the Court Below Was Correct

The opinion of this court in *United Mine Workers of America, et al.* v. *Arkansas Oak Flooring Company*, 351 U.S. 62, is such a full and complete exposition of the law relative to those unions which elect not to file the reports and affidavits specified in Section 9 (f), (g) and (h) of the Labor Management Relations Act of 1947, as amended, that United States Courts of Appeal do not, we believe, have any need of further clarification by this court.

The two United States Courts of Appeal[1] which have since considered the order banning recognition

[1] Petitioner, in a footnote, states that no review was sought in the other case, District 50 v. National Labor Relations Board, 234 F. 2d 565 (4th Circuit), "because the court there remanded the case on the merits." The Board, after doing nothing to carry out that court's order of June 5, 1956, did on December 28, 1956,

QUESTIONS PRESENTED

We state the questions presented as follows:

1. May the National Labor Relations Board, by the device and stratagem of an "unless and until" certified order, amend the Labor Management Relations Act of 1947, as amended, so as to compel a labor union to file the reports and affidavits specified in Sections 9.(f), (g) and (h) of the Act under penalty of disability in perpetuity to act as representative of employees, should it fail so to do?

2. Where the facts are undisputed, the law is plain, and the order of the Board clearly thwarts the policy of the Act, must a United States Court of Appeals, on petition for review, prolong litigation by remanding a case for the Board to redraft its order? In short, does the Act give the court the power to modify an order of the Board?

STATUTE INVOLVED

The pertinent sections of the Labor Management Relations Act of 1947, as amended, (61 Stat. 136, 29 U.S.C. 151, et seq.) not in Petitioner's Appendix are reprinted in this Appendix, infra, pp. 27-31.

STATEMENT

The statement of petitioner needs to be supplemented by the following additional information:

1. District 50, not being a party to the proceedings before the Trial Examiner and the Board in the first instance, had no legal opportunity to dispute the findings of fact and, therefore, has never at any time disputed the findings of fact made by the Trial Examiner and approved by the Board.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 672

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

DISTRICT 50, UNITED MINE WORKERS OF AMERICA, and BOWMAN TRANSPORTATION, INC., *Respondents*

BRIEF IN OPPOSITION OF DISTRICT 50, UNITED MINE WORKERS OF AMERICA, RESPONDENT

OPINIONS BELOW

The majority and dissenting opinions of the court below (Appendix, infra, pp. 11-27) are reported in 237 F(2d) 585-592. The findings, conclusions, decision and order of the Board (R. 675-703, 714-719) are reported at 112 NLRB 387, and its Supplemental Decision and Order (R. 730-736) is reported at 113 NLRB 786.

JURISDICTION

This court has jurisdiction as stated in the petition.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

DISTRICT 50, UNITED MINE WORKERS OF AMERICA, and BOWMAN TRANSPORTATION, INC., *Respondents*

BRIEF IN OPPOSITION OF DISTRICT 50, UNITED MINE WORKERS OF AMERICA, RESPONDENT

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

the labor organization affected is affiliated with a labor organization national or international in scope. * * *

* * * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order * * *. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. * * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. * * * Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board * * *.

U. S. GOVERNMENT PRINTING OFFICE: 1957

more than an "Edgar Bergen-Charlie McCarthy" situation. The voice of the dummy is in reality the voice of the master. There is no process by which the dummy could ever be transformed into a vital union; hence, it should be forever removed from the scene.

The Board also attempted to justify its "unless and until" certified order by its practice from the earliest days. The practice grew up under the Wagner Act. That Act did not deny the processes of the Board to any "labor organization." That Act did not contain anything resembling Section 9 (f), (g) and (h) of the Labor Management Relations Act of 1947, as amended.

Furthermore, the ordinary cease and desist order of that period was effective for a very short period of time: "As a matter of practice, the Board permitted the union to petition for an election within 60 days of such determination." CCH Labor Law Reporter, 4th Ed., Vol. 2, p. 3965, par. 3595.

In continuing the use of the same order after the passage of the Labor Management Relations Act of 1947, as amended, the Board did not take into account the realities of the situation. Under the old Wagner Act, prior to the amendments, neither the employees nor the union selected by them were adversely affected. Under the new Act, such an order adversely affects the union. It amounts to a denial to the employees of the full freedom of choice of their bargaining agent and denies to the chosen labor union the right to represent such employees.

E. The Order of the Court Was Appropriate

Section 10 (e) and (f) gives United States Courts of Appeal power to "enter * * * a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board." The Act contains no limitation upon the manner in which the Courts of Appeal may modify such orders. If the order is too broad, the court may narrow it. If the order is too narrow, the court may broaden it.

The petitioner urges that the court should have remanded the case in order that the Board might re-draft its order. The United States Courts of Appeal are not conducting a course in advanced composition. Litigation would be indefinitely prolonged if the court had to remand, the Board rewrite, the litigant take a second appeal, the court remand again, the Board try its hand at composition again and the litigant again petition for review. The Attorney General appoints a Commission to cure the law's delay; the Board suggests a procedure which would increase that delay. If the procedures advocated by the Board should be followed, the courthouses of the United States should have added to their structures a wailing wall against which those drawn into litigation might bemoan their fate.

The petitioner complains that the court below erred in eliminating all references to the Teamsters' Union. Congress established the National Labor Relations Board in order that it might secure to employees full freedom of choice and designation of their representatives. The Board was not established in order to influence that choice.

Where the order of the Board is susceptible of being construed to prefer the Teamsters' Union, the elimination of this preference hurts nobody. It does not deprive the Teamsters' Union of any right given it by the Act. It places no penalty upon that union. It promotes free selection by the employees.

The matter complained about seems too trivial to invoke the jurisdiction of this court. Surely it is not necessary for this court to pinpoint multitudinous little decisions in order for the lower federal courts to plot the course which they should follow.

CONCLUSION

For the foregoing reasons we respectfully submit that the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

1. Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,887

DISTRICT 50, UNITED MINE WORKERS OF AMERICA, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Petition for Review of Order of National Labor Relations Board

---

No. 12,950

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

BOWMAN TRANSPORTATION, INC., RESPONDENT

Petition for Enforcement of an Order of the National Labor Relations Board

---

Decided October 4, 1956

Mr. E. Crampton Harris, with whom *Messrs. Velverton Cowheid* and *Alfred D. Treherne* were on the brief, for petitioner in No. 12,887.

Mr. Frederick U. Reel, Attorney, National Labor Relations Board, of the bar of the Supreme Court of Wisconsin, *pro hac vice*, by special leave of Court, with whom

Messrs. Theophil C. Kammholz, General Counsel, National Labor Relations Board, *David P. Findling*, Associate General Counsel, National Labor Relations Board, and *Marcel Mallet-Prevost*, Assistant General Counsel, National Labor Relations Board, and *Mrs. Nancy M. Sherman*, Attorney, National Labor Relations Board, were on the brief, for respondent in No. 12,887 and petitioner in No. 12,950. *Mr. Robert G. Johnson*, Attorney, National Labor Relations Board, also entered an appearance for respondent in No. 12,887 and petitioner in No. 12,950.

No appearance for respondent in No. 12,950.

Before PRETTYMAN, WILBUR K. MILLER and WASHINGTON, Circuit Judges.

WILBUR K. MILLER, *Circuit Judge:* The National Labor Relations Board petitions for enforcement of its order which requires Bowman Transportation, Inc., an interstate trucking company, to cease and desist from certain unfair labor practices, and to redress them by taking the prescribed affirmative action. Bowman Transportation has not complained of the order and did not appear here. But District 50, United Mine Workers of America, which had been chosen by the Bowman employees as their exclusive bargaining representative but has not been certified as such by the Board, petitions us to review and set aside three paragraphs of the order by which it feels aggrieved.

The background of the Labor Board's order and its essential features may be quickly sketched. In November, 1952, the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, Local No. 612, undertook to organize Bowman's employees and established a picket line at its main terminal in Gadsden, Alabama. The Teamsters' efforts, opposed by the company, were unsuccessful but were still in progress, at least to the extent of the picketing which a state court first enjoined but later permitted, with violence

and disorder forbidden, when another labor organization appeared on the scene in May, 1954.

The president of Bowman called a meeting of all employees for May 22, after having been told by some employees they wanted a contract, and after having conferred with organizers for District 50. The meeting was largely attended. Those present voted unanimously to be represented by District 50 and most of them signed authorization cards, whereupon Bowman recognized that union as the bargaining representative and entered into a contract with it.

Because of these events, the General Counsel of the Labor Board charged Bowman with several unfair labor practices. After a hearing the Board found: (1) that Bowman discriminatorily discharged driver Gross and removed driver Lackey from his regular run because of their activities in behalf of Teamsters, thereby discouraging membership in that union, an unfair labor practice within the meaning of § 8(a)(3) of the Act; (2) that Bowma interfered with the administration of District 50 and contributed support to it and so engaged in unfair labor practices within the meaning of § 8(a)(2) of the Act; and (3) that Bowman interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in § 7 of the Act, and thereby engaged in unfair labor practices within the meaning of § 8(a)(1) of the Act.

Upon these findings, the Board ordered Bowman to cease and desist from: 1(a) the unfair labor practices found by it; 1(b) interfering with, restraining or coercing its employees in the exercise of their statutory rights; and from

> "[1](c) Giving effect to the collective bargaining agreement, dated May 22, 1954, between the Respondent and District 50, United Mine Workers of America, or to any extension, renewal or modification

thereof, or any other contract agreement between the Respondent and the said labor organization which may now be in force;

"[1](d) Recognizing District 50, United Mine Workers of America, as the representative of its employees for the purpose of dealing with the Respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until the said labor organization shall have been certified as such representative by the Board."

The portion of the order requiring affirmative action directed Bowman to offer reparations to drivers Gross and Lackey, and to

"[2](c) Withdraw and withhold all recognition from District 50, United Mine Workers of America, as representative of its employees for the purpose of dealing with the Respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until the said labor organization shall have been certified as such representative by the Board."

The order also required Bowman to post prescribed notices.

May 11, 1955, before enforcement of the order had been sought, District 50, which had not theretofore been a party to the proceeding, filed with the Board an application to modify the order by striking therefrom paragraphs 1(c), 1(d) and 2(c), which we have reproduced above. The application was denied by the Board.

Part of the background of the Board's order is the fact that the Teamsters union had theretofore filed the information and affidavits described in § 9(f), (g) and (h) of the Labor Management Relations Act, 1947, while United Mine Workers of America, the parent union of District 50, has not filed thereunder. Teamsters was and is therefore eligible to be certified as the bargaining

representative of Bowman's employees if it were chosen by them, but District 50, though chosen, may not be certified so long as its parent is in a state of non-compliance.

That Bowman had engaged in the unfair labor practices found by the Board clearly appears from the evidence. It was appropriate to order, as the Board did, that the employer correct its discriminatory treatment of drivers Gross and Lackey, and that it cease and desist from giving effect to its contract with District 50, which was unfairly arrived at through Bowman's illegal assistance to that union. In those respects the order should be enforced.

This leaves for consideration paragraphs 1(d) and 2(c) of the order which direct Bowman to cease and desist from recognizing District 50 as the bargaining representative, and to withdraw and withhold such recognition, "unless and until the said labor organization shall have been certified as such representative by the Board." District 50's attack on these portions of the order raises the question whether the Labor Board has authority to forbid an employer to recognize or contract with a labor organization chosen by its employees as their exclusive bargaining representative so long as the union remains uncertified as such.

We hold the Board does not have such authority. In *United Mine Workers of America* v. *Arkansas Oak Flooring Co.*, 351 U. S. 62, 71-2 (1956), the Supreme Court observed that there is no statutory provision to the effect that a non-complying union "may not represent an appropriate unit of employees if a majority of those employees give it authority so to do." The Court went on to say:

> ". . . Likewise, there is no statement precluding their employer from voluntarily recognizing such a noncomplying union as their bargaining representa-

> tive. Section 8(a)(5) declares it to be an unfair labor practice for an employer 'to refuse to bargain collectively with the representatives of his employees, *subject to the provisions of section 9(a).*' (Emphasis supplied.) Section 9(a), which deals expressly with employee representation, says nothing as to how the employees' representative shall be chosen. See *Lebanon Steel Foundry* v. *Labor Board*, 76 U.S. App. D. C. 100, 103, 130 F. 2d 404, 407. It does not make it a condition that the representative shall have complied with § 9(f), (g) or (h), or shall be certified by the Board, or even be eligible for such certification."

In footnote 8, 351 U. S. at 72, the Court noted that "A Board election is not the only method by which an employer may satisfy itself as to the union's majority status."

In a recent case somewhat similar to this one,[1] Chief Judge Parker of the Fourth Circuit discussed the *Oak Flooring* opinion and said:

> ". . . If a cease and desist order were proper under the circumstances of the case, it should have been couched in language which would not have precluded representation of the employees by District 50 if chosen by a majority to represent them after all effects of any unfair labor practice had been eliminated." . . .

We adopt the language just quoted as applicable to this case. Paragraphs 1(d) and 2(c) are therefore improper and should not be enforced in their present form, since they preclude District 50 from representing the employees in the future, even though hereafter they should choose it in an atmosphere and a situation entirely free from the influence of unfair labor practices. There should be added, at the end of each of those paragraphs, the words "or shall have been freely chosen as such by a

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[1] *District 50, United Mine Workers of America* v. *National Labor Relations Board and Pittsburgh Valve Co.* v. *National Labor Relations Board*, 234 F. (2d) 565, 571 (4th Cir. 1956).

majority of the employees after all effects of unfair labor practices have been eliminated."

With paragraphs 1(d) and 2(c) amended in the manner indicated above, and with the slight changes in the notice to be posted by the company which will hereinafter be suggested, we think the order will achieve the Board's proper objective, which is to eliminate the effects of Bowman's unfair labor practices so as to place Teamsters, District 50, employer and employees *in statu quo ante*, and to forbid and guard against future unfair practices by the employer, so that thereafter the employees and any and all unions concerned may work out the representation problem, untrammeled by any outside influence. When this objective has been reached, and if the employees then want a bargaining representative, they will be in a position to choose one in any manner which clearly indicates their desire. They may select non-complying District 50, or complying Teamsters, or any other complying or non-complying Union, and the employer must recognize their choice. The only limitation is that, if the Board conducts an election, District 50 will not be on the ballot. Amended in the manner we have indicated, the order will be enforced.

There still remains, however, the necessity of deciding when the ill effects of Bowman's past practices have been removed. Certainly, one effect of Bowman's unfair labor practices is removed by requiring the offer of reparation to the two drivers. Another is eliminated by striking down the present contract, unfairly arrived at, between Bowman and District 50. The possibility of continuing effect is guarded against by ordering Bowman (1) to cease and desist from the labor practices found to be unfair; (2) to refrain in the future from engaging in those or any other unfair practices; and (3) to post notices for 60 days that, in obedience to the Board's order, it will make the required amends and will not in the future interfere in any way with the

organizational efforts of any union, or with the employees' exercise of the rights guaranteed to them by law.

We think that, 60 days after the notices have been posted, it may reasonably and safely be assumed that normalcy has been restored by the Board's corrective order. Thereafter, if a Board election should be required and if the employees should therein select Teamsters or some other complying union as bargaining representative, the matter would be at an end. But, if in an election the employees should reject any and all candidates, or if no election is held, and if the employees should designate District 50 as their choice, that union will become the bargaining representative.

The form of notice to be posted by the company should be modified so as not to be inconsistent with this opinion. Moreover, the notice should not indicate that the Board prefers Teamsters. We suggest that references to that union in the Board's form of notice are susceptible of being construed as so indicating, and might better be omitted so that the company's pledges of non-interference will apply to all labor organizations. We attach as an appendix what we regard as a proper notice.

The order under review will be amended in the manner set forth in the foregoing opinion. As so amended, the order will be enforced.

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO A DECREE

of the United States Court of Appeals for the District of Columbia Circuit, enforcing an order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL NOT discourage membership in any labor organization of our employees, by discharging or refusing to reinstate any of our employees, or in any other manner discriminating in regard to their hire or tenure of employment, or any term or condition thereof, because of their activity in behalf of or membership in such labor organization.

WE WILL offer to Welch Gross, upon his application, immediate and full reinstatement in his former position or in one substantially equivalent, without prejudice to any seniority or other rights and privileges he previously had, with back pay from the date of his discharge to the date of his reinstatement.

WE WILL offer assignments to Joe Lackey, upon his re-employment, the equivalent to those he had before he was removed from his regular run.

WE WILL NOT interrogate our employees concerning their activities in behalf of any labor organization in a manner which constitutes interference, restraint or coercion in violation of §8(a)(1) of the Act, and we will not engage in surveillance of our employees at labor organization meetings.

WE WILL NOT interfere with the formation or administration of any labor organization or contrib-

ute financial or other support to any such organization.

WE WILL NOT give effect to our agreement, dated May 22, 1954, with District 50, United Mine Workers of America, or to any other contract or agreement with District 50 which may now be in force, since the National Labor Relations Board has held that the contract was brought about through unfair labor practices.

WE WILL NOT recognize District 50 as the bargaining representative of our employees, unless and until it shall have been certified as such representative by the National Labor Relations Board, or shall have been selected as such by a majority of our employees at a time at least 60 days later than the date of this notice.

All our employees are free to become, remain, or refrain from becoming, members of any labor organization, except to the extent that this right may be affected by agreements made in conformity with § 8(a)(3) of the National Labor Relations Act, as amended.

BOWMAN TRANSPORTATION, INC.
(Employer)

Dated ..... By .....
(Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

WASHINGTON, *Circuit Judge*, dissenting: I am constrained to disagree with the court's action in modifying the Board's order.

I. Section 10(c) of the Labor Management Relations Act of 1947, 29 U.S.C. § 160(c) (1952), authorizes the

Board, when it finds that an unfair labor practice has been committed, to "cause to be served on such person [committing the unfair labor practice] an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action . . . as will effectuate the policies of this subchapter."[1] These policies include, among others, the elimination of unfair labor practices by employers and unions, and the protection of the employees' right to designate a bargaining representative of their own choosing, as expressed in Section 9(a) of the Act.

It seems quite clear that a provision prohibiting an employer from recognizing a union unfairly controlled or supported by the employer until that union has been certified as the bargaining agent of the employees would in many cases be an important factor in purging unfair labor practices. In remedying such practices the Board has long inserted a provision of that sort in its orders. Even stronger action has sometimes been taken by the Board, and the Supreme Court has supported it. For example, employer-dominated unions have on occasion been ordered completely disestablished, with Supreme Court approval. *National Labor Relations Board* v. *Falk Corp.*, 308 U.S. 453 (1940); *H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U.S. 514 (1941); *Labor Board* v. *Link-Belt Co.*, 311 U.S. 584 (1941). And in a case where the employer had assisted union A, the Board ordered him to deal exclusively with union B (a rival), even though before the order was issued the Board had been advised that a majority of the employees wished to be represented by the assisted union. The order was upheld. *International Association of Machinists* v. *Labor Board*, 311 U.S. 72 (1940). In view of these precedents, the Board may surely take a less stringent course, and in an

[1] The subchapter referred to is that titled "National Labor Relations," which deals generally with the Labor Board, its powers, procedures, and jurisdiction.

appropriate case order non-recognition by the employer of the assisted union as long as it remains uncertified. As to unions complying with the filing provisions of the Act, that conclusion would seem beyond question. As Chief Judge Parker said in *District 50, United Mine Workers* v. *National Labor Relations Board*, 234 F.2d 565 (4th Cir. 1956):

> "... the form of order here entered [similar to that in the instant case] would be appropriate if applied to a union which had complied with the filing provisions of the Labor Management Relations Act ...."

The question here, of course, is whether the fact that a union has not complied with the filing provisions of the Act, and refuses to comply, entitles it to special treatment by the Board. The Ninth Circuit has answered this question in the negative.[2] Yet the decision of the majority here, and of the Fourth Circuit in the *District 50* case, is to the contrary. The holding is—in substance and effect—that the Board cannot as a matter of law apply to a union which has not complied with the filing provisions of the law, the very condition which it could rightfully apply to a complying union. I find no basis in principle for giving a non-complying union an advantage which complying unions do not have. In practice to do so may encourage unions not to comply with the Act.

Mine Workers v. *Arkansas Oak Flooring Co.*, 351 U. S. 62 (1956), relied on by the majority, simply holds that non-compliance by a union with Section 9(f), (g), and (h) of the Act does not open the door to the state courts to

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[2] See National Labor Relations Board v. Wemyss, 212 F.2d 465 (9th Cir. 1954), where the assisted union had not complied with Section 9(f), (g), or (h) (see p. 470), and where the court held that the assistance given warranted issuance of "an order that the employer withdraw recognition from the favored organization unless and until it is certified by the Board after a fair election." (p. 472)

take action against the union that they would not otherwise be able to take. As I read that decision, it was intended to preserve and protect the authority of the National Labor Relations Board, not to undermine and weaken it. It can hardly be interpreted as holding that noncompliance by a union prevents the National Labor Relations Board from taking action which it is authorized to take against a *complying* union, and which the Act itself permits. It is true that the Supreme Court's opinion declares that "no consequences other than those so-listed [in the Act] shall result from noncompliance." 351 U. S. at 73. But the context of this statement indicates that the Court was referring to consequences apart from those sanctioned by the Act itself. "Elimination of the Board [as a forum or resort by any union not complying with the filing provisions of the Act] does not, however, eliminate the applicability of the National Labor Relations Act, as amended . . . ." *Id.* at 74.

2. The principle is now well established that the Board, and not the courts, is primarily charged with the responsibility of determining what provisions are best included in Board orders to carry out the policies of the Act. "The particular means by which the effects of unfair labor practices are to be expunged are matters 'for the Board not the courts to determine' . . . We give considerable weight to that administrative determination. It should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Electric Co.* v. *Labor Board*, 319 U. S. 533, 539-40 (1943), citing *International Association of Machinists* v. *Labor Board*, 311 U. S. 72 at 82 (1940); *Labor Board* v. *Link-Belt Co.*, 311 U. S. 584 at 600 (1941). The majority has not suggested that the Board's order does not effectuate the policies of the Act or that it was not intended to do so. Nor, as I view the case, could such a conclusion fairly be reached.

Concededly, if District 50 or its parent organization persists in refusing to file the required statements and affidavits, the Board's order will effectually preclude the employer from recognizing and contracting with District 50 as the employees' bargaining agent, even though the employees continue to favor it. But this restraint on the employees' freedom of choice is in part due to the attitude of the union, which has chosen not to comply with Section 9. Furthermore, if the Board properly concludes that the certification of the union in the normal way is necessary to dissipate the effect of the unfair labor practices, the order would tend to assure—rather than deny—the freedom of choice guaranteed by the Act by removing improper restraints on the employees. See *International Association of Machinists* v. *Labor Board*, 311 U. S. at 82; *H. J. Heinz Co.* v. *Labor Board*, 311 U. S. at 522.

The Board stated here that the disputed provision of its order was included "To remedy the effect of the illegal assistance to the FMW," and further that:

> "By its Order, the Board is merely directing that the FMW, like any other assisted union, demonstrate that its right to be the exclusive representative of the employees involved has been established in an atmosphere free of restraint and coercion."

And with regard to its previous practice the Board stated:

> "However, in the case of an assisted but undominated labor organization, the Board has required the offending employer to withdraw and withhold recognition from the assisted union until it was certified, thus enabling the Board to assure the affected employees that their statutory right to freely choose a bargaining representative shall be preserved by conducting an election under conditions which will render such a choice possible."

It is true that the Board did not expressly consider any alternative remedies—such as conducting an investigation at a later time to determine whether the effects

of the unfair labor practices had by then been dissipated. But District 50 suggested no such alternative: it simply argued to the Board that the order was beyond the Board's power. When this argument was rejected, it appealed to this court on the same ground. As I have indicated, I think that ground is clearly untenable: in a proper case, the Board has power to enter an order of the present sort. And I think that this is such a case, and that the Board's findings were adequate to support its action—especially since it was never asked to consider any other type of action. But if this be doubted, *cf. Siegel Co.* v. *Federal Trade Commission*, 327 U. S. 608 (1946), the proper course for this court is to remand the case to the Board for further consideration. Certainly it is not within our province for us to rewrite the Board's order to choose a different remedy than it has chosen, and to direct that our new order be enforced. *See National Labor Relations Board* v. *Falk Corp.*, 308 U. S. 453 (1940); *Federal Power Commission* v. *Idaho Power Co.*, 344 U. S. 17, 20 (1952).

2. Judgment Below

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

October Term, 1956

No. 12,887

DISTRICT 50, UNITED MINE WORKERS OF AMERICA, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

October Term, 1956

No. 12,950

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

BOWMAN TRANSPORTATION, INC., RESPONDENT

On Petition for Review and on Petition for Enforcement of an Order of the National Labor Relations Board

Before: PRETTYMAN, WILBUR K. MILLER, and WASHINGTON, *Circuit Judges*.

ORDER AND DECREE

These cases came on to be heard on the record from the National Labor Relations Board and on a petition for review and a petition for enforcement of the order of the National Labor Relations Board herein, and were argued by counsel.

On consideration whereof, it is ORDERED and DECREED by the Court that the order of the Board on review herein be, and the same is hereby, modified as indicated in the opinion of this Court and, as so modified, will be enforced.

It is, therefore, ORDERED by the Court that the National Labor Relations Board shall within 10 days serve and

file a proposed enforcement decree and form a notice conforming with the views set forth in the opinion of this Court. The provisions of paragraph (1) of Rule 38 of this Court shall apply thereto.

Dated: October 4, 1956

Per Circuit Judge Wilbur K. Miller.

3. Statute Involved

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, et seq.) which are not printed in the Appendix of the Petitioner are as follows:

SHORT TITLE AND DECLARATION OF POLICY

Section 1. (a) This Act may be cited as the "Labor Management Relations Act, 1947."

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and manage-

ment which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

FINDINGS AND POLICY

"Section 1. The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

"The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

"Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the

friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

"Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

"It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

RIGHTS OF EMPLOYEES

"SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

"UNFAIR LABOR PRACTICES

"SEC. 8. (a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

"(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; and has at the time the agreement was made or within the preceding 12 months received from the Board a notice of compliance with sections 9 (f), (g), and (h) and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such

labor organization to make such an agreement; *Provided further*, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

REPRESENTATIVES AND ELECTIONS

"SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

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No. 64

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

DISTRICT 50, UNITED MINE WORKERS OF AMERICA, and BOWMAN TRANSPORTATION, INC., *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF OF DISTRICT 50, UNITED MINE WORKERS OF AMERICA, RESPONDENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 64

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

DISTRICT 50, UNITED MINE WORKERS OF AMERICA, and BOWMAN TRANSPORTATION, INC., *Respondents*

BRIEF OF DISTRICT 50, UNITED MINE WORKERS OF AMERICA, RESPONDENT

STATUTE INVOLVED

The pertinent sections of the Labor Management Relations Act of 1947, as amended, (61 Stat. 136, 29 U.S.C. 151, et seq) are reprinted in this Appendix, infra, pp. 30-36.

STATEMENT OF THE CASE

The National Labor Relations Board, under complaints based on charges by the Teamsters' Union,[1]

[1] International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, Local No. 612.

held that Bowman Transportation, Inc. had been guilty of an unfair labor practice with reference to the Teamsters' Union in November, 1953 and that Bowman Transportation, Inc. had unlawfully supported and assisted District 50, United Mine Workers of America, in May, 1954 in violation of Section 8 (a) (2) and Section 8 (a) (1) of the Labor Management Relations Act of 1947, as amended.

District 50 not being a party to the proceedings entered the case under Section 10 (d) by filing an application to modify the Board's order. This application (R. 40-41) asked the Board to modify the order by deleting and striking therefrom paragraphs 1 (c) and 1 (d) and paragraph 2 (c).

Paragraph 1 (c) ordered Bowman Transportation, Inc. to cease and desist giving effect to the collective bargaining agreement made with District 50 on May 22, 1954. Paragraph 1 (d) ordered the employer to cease and desist from recognizing District 50 as the representative of its employees and paragraph 2 (c) ordered the employer to withdraw and withhold all recognition from District 50 as representative of its employees, both paragraphs to be effective "unless and until the said labor organization shall have been certified as such representative by the Board".

The application informed the Board that District 50, United Mine Workers of America, had not complied with the provisions of Section 9 of the Labor Management Relations Act of 1947, as amended (a fact which the Board presumably already knew). In support of the application, District 50 submitted eleven (11) different grounds (R. 42-43):

By stipulation filed in the court below on November 29, 1955, all parties agreed upon the questions presented (R. 1-2) and by an amendment to the stipulation filed December 12, 1955, upon which the court entered an order December 13, 1955 (R. 69-70), question c. of the original stipulation was stricken. The only questions left in the case so far as District 50 was concerned were questions a. (3) and b.

"a. Whether substantial evidence on the record as a whole supports the findings of the Board that Bowman Transportation, Inc.—

* * * * *

(3) Violated Section 8 (a) (2) and (1) of the Act by assisting or contributing support to District 50.

b. Whether the Order of the Board directing Bowman Transportation, Inc. to withhold recognition from District 50 unless and until that organization is certified by the Board as representative of Bowman's employees, is a proper and lawful order."

The court below held, "that Bowman had engaged in the unfair labor practices found by the Board clearly appears from the evidence" and that the order was appropriate except with respect to paragraphs 1 (d) and 2 (c) containing the phrase, "unless and until the said labor organization shall have been certified as such representative by the Board". (R. 52)

The court states the question and its holding thereon in this language:

"* * * District 50's attack on these portions of the order raises the question whether the Labor Board has authority to forbid an employer to recognize or contract with a labor organization chosen by its em-

ployees as their exclusive bargaining representative so long as the union remains uncertified as such.

"We hold the Board does not have such authority.* * *" (R. 52-53).

The court below adopted as applicable to the instant case the language of Chief Judge Parker of the Fourth Circuit (R. 53-54) and held paragraphs 1 (d) and 2 (c) were improper and should not be enforced in their present form since they precluded District 50 from representing the employees in the future, "even though hereafter they should choose it in an atmosphere and a situation entirely free from the influence of unfair labor practices. There should be added, at the end of each of those paragraphs, the words 'or shall have been freely chosen as such by a majority of the employees after all effects of unfair labor practices have been eliminated'". As thus amended, the order of the Board was enforced.

The court also suggested a form of notice to be posted by Bowman Transportation, Inc. and deleted therefrom the reference to the Teamsters' Union so that the notice should not indicate that the Board preferred the Teamsters (R. 55).

Wilbur K. Miller, Circuit Judge, wrote the opinion in which Circuit Judge Prettyman joined. Circuit Judge Washington wrote a dissenting opinion which closely followed the supplemental decision and order of the Board and the brief and argument of counsel for the Board in the court below.

SUMMARY OF ARGUMENT

I

A. We submit a Board order directing an employer to withhold recognition from a union which has not filed documents specified in Section 9 (f) (g) and (h) "unless and until" that union "shall have been certified" is not a proper and lawful order. Two courts and two law review articles agree with our contention. The ratio decidendi of *United Mine Workers of America* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62, leads to this conclusion.

We buttress our argument with four sufficient and necessary postulates, to wit:

(1) A Constitutional Act of Congress is the supreme law.

(2) It is the duty of courts and administrative boards to apply and enforce the public policy embodied in an Act of Congress.

(3) An order which deprives employees and unions of rights specifically protested by an Act of Congress and contravenes the public policy of the Act cannot stand.

(4) The right to nullify an Act of Congress cannot be acquired by prescription.

B. The first step is to go to the Act itself to ascertain the public policy of the United States. That policy is expressly declared in the last paragraph of Section 1 and reinforced by Section 7 which gives workers full freedom of designation and full freedom of choice of their representatives. By the definitions of "representatives" and "labor organizations" in Section 2

(4) and 2(5) respectively, the freedom is further extended.

C. Certification is not a condition precedent to representation and a Board election is not the only method by which majority status may be established. *Arkansas Oak Flooring Co.* case 351 U.S. 62 at 71-72.

D. Congress did not make filing under Section 9 (f), (g) and (h) compulsory nor a condition precedent to representation. It provided no penalties. The Act gives no punitive power to the Board nor does it give to the Board the power to compel filing under Section 9 (f), (g) and (h). The Board has remedial powers only under Section 10 (e) to effectuate the purposes of the Act. *N.L.R.B.* v. *Flotill Products, Inc.*, 180 F. (2d) 441 (C.A. 9); *N.L.R.B.* v. *Pennsylvania Greyhound Lines*, 303 U.S. 261, 267; *N.L.R.B.* v. *Gullett Gin Co.*, 340 U.S. 361 at 362.

E. The order of the Board must be adapted to the need of the individual case. *N.L.R.B.* v. *Pennsylvania Greyhound Lines*, 303 U.S. 261, at 268.

F. Although the Board and not the courts determine how the effect of unfair labor practices may be expunged, it does not have the power to require certification because certification does not expunge anything. Certification comes after a majority of employees have freely chosen their representative. A certification cannot work backwards in time. It cannot possibly have had any effect upon the minds of the workmen at the time they made their choice.

G. The use of the "unless and until certified" form of order grew up under the Wagner Act. That Act did not contain Section 9(f), (g) and (h). The enactment of that Section made filing of the financial

reports and affidavits conditions precedent to certification. Cases under the Wagner Act are beside the point. Even if the order had been used for twenty years under the present Act, the Board can acquire no prescriptive right to nullify or amend an Act of Congress.

H. The decision of the court below gives District 50 no preferred treatment. We do not ask for preferred treatment. We ask merely that the policy of the Act be followed, the remedy adapted to the situation and that neither the employees nor this union be deprived of rights expressly protected under the Act.

I. An order or device lawful under one set of circumstances becomes unlawful if it accomplishes an unlawful result. *Federal Trade Commission v. National Lead Company*, 352 U.S. 419; *Ethyl Gasoline Corp* v. *United States*, 309 U.S. 436.

II

J. In answer to the argument of Petitioner on Question Number 2, we submit court's order was not in excess of its authority and the court did not err in rewriting the order instead of remanding the case to the Board. This case arises under Section 10 (f). That Section granted the court below express power to "enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board". The decision of the Board on a question of law stands on a different basis before the United States Courts of Appeal from its decision on a question of fact. " * * * an order may not stand if the agency has misconceived the law. * * * ". *Securities & Exchange Commission v. Chenery Corp.*, 318 U.S. 80, at 94.

III

K. As to Question Number 3: The elimination from the notice of all references to the charging union seems to us to be a proper step forward in the complex and changing field of labor relations. Neither District 50's application nor its petition for review called for the taking of any further testimony before the Board, and we suggest that the language of Section 10 (e), "that no objection that has not been urged before the Board, its member, agent or agency shall be considered by the court" which does not appear in 10 (f) might well be held not to apply. Section 10 (e) applies to a party and Section 10 (f) to any aggrieved person.

ARGUMENT

Question Number 1

A. Question Number 1, the primary question in this case, is one of first impression in this Court. Both the court below and the United States Court of Appeals for the Fourth Circuit[2] agree in holding that an order of the Board directing an employer to withhold recognition from District 50 "unless and until the said labor organization shall have been certified as such representative by the Board" is not a proper order as to District 50, which has not filed the reports and affidavits specified in Section 9 (f) (g) and (h) of the Act.

Two law reviews have reviewed the decision of the court below (Harvard Law Review of May, 1957, Volume 70, No. 7 at page 1306 and the Minnesota Law Review of May, 1957, Volume 41 at page 825). Both Reviews likewise agree in holding that the order

[2] *District 50, United Mine Workers of America* v. *N.L.R.B.* and *Pittsburgh Valve Co., et al* v. *N.L.R.B.*, 234 F (2d) 565, 571.

was beyond the Board's authority. However, the note writers seem to think the court below should have remanded the case to the Board.

The decision of this Court in the case of *United Mine Workers of America* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62, is the basic authority on which the court below relied. The opinion of this Court in that case is so clear and comprehensive that we might well rest our argument on Question Number 1 on that case alone. However, in view of the great mass of authorities cited by counsel for Petitioner, we desire to call to the Court's attention certain fundamental principles and some additional cases.

In the solution of any problem, whether legal or mathematical, it is well for those who exercise their reason to agree on the fundamental postulates or assumptions. The necessary postulates or assumptions in this case seem to us to be few in number. They are:

First. A Constitutional act of Congress which declares the public policy of the United States is the supreme law.

Second. It is the duty of the courts and the lesser administrative tribunals to apply and enforce the public policy embodied in an act of Congress.

Third. If an order of the National Labor Relations Board deprives employees and unions of rights specifically protected by the Act and contravenes the public policy of the Act, that order cannot stand.

Fourth. No administrative bureau can acquire by prescription the right to nullify an act of Congress.

B. The first step in our reasoning is to ascertain the public policy of the United States. Evidently, the

best place to find the meaning of an Act of Congress is in the Act itself. As expressed by Mr. Justice Reed in the case of *N.L.R.B.* v. *Dant*, 344 U.S. 375, "We hold that the sought-for congressional intent is found in the language of the Act; and as we have found it, the decision below must be reversed". (p. 385)

Mr. Chief Justice Stone, in *N.L.R.B.* v. *Pennsylvania Greyhound Lines*, 303 U.S. 261, clearly pointed out the direction in which the Court should look when passing upon a challenge to the order of the Board under the Wagner Act (hence, under the Labor Management Relations Act of 1947, as amended). His language is:

"Hence, upon the challenge of the affirmative part of an order of the Board, we look to the Act itself, read in the light of its history, to ascertain its policy, and to the facts which the Board has found, to see whether they afford a basis for its judgment that the action ordered is an appropriate means of carrying out that policy." (p. 265)

In studying the Act, it is well to remember that the principal Senatorial sponsor of the Act was an able lawyer and that experienced technicians in the field of labor relations assisted in drafting the Act.

Lest there be any doubt or ambiguity, the draftsmen gave an explicit definition of policy in the last paragraph of Section 1 (App. 30). That Section declares it to be the policy of the United States to eliminate the causes of obstructions to the free flow of commerce and to mitigate and eliminate those obstructions when they have occurred by "encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of * * *

designation of representatives of their own choosing". That full freedom is not limited so far as we can find by any subsequent provision of the Act. On the contrary, Section 7 (App. 30-31) reaffirms the right of employees "to bargain collectively through representatives of their own choosing".

The full freedom of designation and choice of representatives is further extended by the express provision of Section 2 (4) (App. 30) that the "term 'representatives' includes any individual or labor organization".

The area of free choice is further extended by the express definition in Section 2 (5) (App. 30) which enacts that "'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate * * *".

C. It seems clear beyond all doubt that representatives for the purposes of collective bargaining are not confined and limited to unions possessing a Labor Board certification. In *United Mine Workers of America* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62 at p. 71, this Court said:

"Section 9 (a), which deals expressly with employee representation, says nothing as to how the employees' representative shall be chosen. See *Lebanon Steel Foundry* v. *Labor Board*, 76 U.S. App. D.C. 100, 103, 130 F. 2d 404, 407. It does not make it a condition that the representative shall have complied with Section 9 (f), (g) or (h), or shall be certified by the Board, or even be eligible for such certification."

Footnote number 8 to the opinion reads as follows:

"A Board election is not the only method by which an employer may satisfy itself as to the union's majority status. See, *e.g.*, *Labor Board* v. *Bradford Dyeing Assn.*, 310 U.S. 318, 338-339; *Labor Board* v. *Knickerbocker Plastic Co.*, 218 F. 2d 917, 921-922; *Labor Board* v. *Parma Water Lifter Co.*, 211 F. 2d 258, 261; *Labor Board* v. *Indianapolis Newspapers, Inc.*, 210 F. 2d 501, 503-504; *Labor Board* v. *Kobritz*, 193 F. 2d 8, 14; *Brookville Glove Co.*, 114 N.L.R.B. No. 52 (October 6, 1955), 36 L.R.R.M. 1548, 1549, n. 4."

Section 9 (f), (g) and (h).

D. The wording of Section 9 (f), (g) and (h) makes it clear that filing the reports and affidavits is not compulsory. Two United States Courts of Appeal touched upon this before this Court handed down its decision in the *Arkansas Oak Flooring Co.* case, 351 U.S. 62.

The United States Court of Appeals for the First Circuit has given a clear statement of the law in *National Labor Relations Board* v. *Reed & Prince Mfg. Co.*, 205 Fed. 2nd 131, 133-134. In that case, the respondent contended that it was under no statutory duty to bargain with a non-complying union. The Court says:

"The short answer is that Congress has not made compliance with the filing requirements of par. 9 (f), (g) and (h) a condition precedent to the obligation of an employer under par. 8 (a) (5) to bargain collectively with the chosen representative of the employees; such compliance is merely made a condition precedent to invoking the machinery of the Act for the investigation of a question concerning representation, or for

the issuance of a complaint charging the commission of unfair labor practices."

The United States Court of Appeals for the Second Circuit gave the same construction to the provisions of the Act in the case of *N.L.R.B.* v. *Pecheur Lozenge Co., Inc.*, 209 Fed. 2nd 393, 402, 2nd Cir. 1953. Their language is:

"In these circumstances, while failure to file the non-communist affidavits required by Section 9 (h) and financial statement and other reports required by Section 9 (f) and (g), bars a union from access to the processes of the Board, it does not necessarily destroy the Union's status as bargaining representative for purposes of Section 8 (a) 5. *West Texas Utilities Co.* v. *N.L.R.B.*, 87 U.S. App. D.C. 179, 184 F. 2nd 233, certiorari denied, 341 U.S. 939, 71 S. Ct. 999, 95 L. Ed. 1366; *N.L.R.B.* v. *Tennessee Egg Co.*, 6 Cir., 201 F. 2d 370, reversing 199 F. 2d 95 on the authority of *N.L.R.B.* v. *Dant*, 344 U.S. 375, 73 S. Ct. 375; *N.L.R.B.* v. *Reed and Prince Mfg. Co.*, 1 Cir., 205 F. 2d 131, 133. In the latter case, the Court held that 'Congress has not made compliance with the filing requirements of 9 (f), (g) and (h) a condition precedent to the obligation of an employer under 8 (a) (5) to bargain collectively with the chosen representative of the employees.' ".

In the *Arkansas Oak Flooring Co.*, case, 351 U.S. 62, at page 69, we find this language:

"The union's failure to file was not a confession of guilt of anything. It was merely a choice not to make public certain information. The Act prescribes no fine or penalty, in the ordinary sense, for failure to

file the specified data and affidavits. The Act does not even direct that they be filed."

and in the text of the opinion at page 73:

"Subsections (f), (g) and (h) of Section 9 merely describe advantages that may be gained by compliance with their conditions. The very specificity of the advantages to be gained and the express provision for the loss of these advantages imply that no consequences other than those so listed shall result from noncompliance."

The public policy of the Act being thus made clear by the Act and the interpretation of this Court, it became the duty of the Board to apply and enforce that public policy. In the celebrated case of *Standard Oil Co.* v. *United States*, 221 U.S. 1, this Court speaking through Chief Justice White made it clear that the Court (and, of course, lesser administrative boards) in arriving at a decision should follow the light of reason and be, "guided by the principles of law and the duty to apply and enforce the public policy embodied in the statute * * *".

The order complained of is compulsion by indirection. The Congress carefully refrained from making the filing compulsory. Evidently the sponsors of the Act did not dare to go that far. The Labor Board now through the device of an order valiantly seeks to do that which Congress would not do.

The Board order penalizes District 50 by depriving it of the right of election to file or not to file, afforded it by the Act.

It is submitted that the Labor Board has no punitive powers. Its powers are remedial only. See *N.L.R.B.* v. *Flotill Products, Inc.* 180 F. 2d 441 (C.A. 9).

In the language of Mr. Justice Roberts: "Section 10(c) was not intended to give the Board power of punishment or retribution for past wrongs or errors. Action under that Section must be limited to the effectuation of the policies of the Act.". *National Labor Relations Board* v. *Newport News Shipbuilding and Dry Dock Company*, 308 U.S. 241 (at 250).

Section 10 (c) of the Act confers remedial power upon the Board in these words:

"If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter."

In the case of *N.L.R.B.* v. *Flotill Products, Inc.*, 180 F. 2d 441, the Circuit Court of Appeals of the Ninth Circuit considered a cease and desist order unless and until the union was certified. The Court set aside the Board's order in its entirety. We quote:

"As of the present no representation proceeding is either pending or in prospect. The Board insists, nevertheless, that the affirmative action it has directed the employer to take, namely, to cease giving effect to the exclusive bargaining and closed-shop relationship unless and until the union is certified, is such action as will effectuate the policy of the law. While it is the task of the Board, not of the Court, to determine matters of administrative policy, the court is obliged

to consider the effect of its own action in situations that appear to it to entail a proposed subversion, rather than an effectuation, of the legislative purpose. *It has many times been said that the fundamental purposes of the Act are to protect commerce from interruptions brought about by strike between employers and workers, and to stabilize labor relations by promoting the principle and practice of collective bargaining. Edison Co.* v. *N.L.R.B., supra; Colgate-Palmolive-Peet Co.* v. *N.L.R.B., supra.* As this case now stands, and has stood for the past two years, enforcement of the Board's order would in our considered judgment tend directly to thwart those purposes. The power granted the Board to direct affirmative action is remedial, not punitive; and the remedial effect of disciplining the employer would at this juncture be slight as compared with the harm certain to follow upon an enforced disruption of the legitimate and long-subsisting relationship between Flotill and this union." (Emphasis supplied) (p. 444)

Mr. Chief Justice Stone in *N.L.R.B.* v. *Pennsylvania Greyhound Lines*, 303 U.S. 261, used this language:

"To secure to employees the benefits of self-organization and collective bargaining through representatives of the employees' own choosing, the Board was authorized by section 10-(c), 29 U.S.C.A. Section 160 (c), to order the abandonment of unfair labor practices and to take affirmative action which would carry out the policy of the Act." (p. 267)

In the case of *N.L.R.B.* v. *Gullett Gin Co.*, 340 U.S. 361, at 362, Mr. Justice Minton used this language:

"To effectuate the policies of the Act, the Board has broad but not unlimited discretion. *Repub-*

lic Steel Corp. v. *Labor Board*, 311 U.S. 7, 11. 'The power to command affirmative action is remedial, not punitive.' Id., at 12. * * *."

The Board cannot impose sanctions not covered by the Act. See *Leedom* v. *International Union*, 352 U.S. 145, and *Meat Cutters* v. *Labor Board*, 352 U.S. 153.

E. The Order of the Board Was Not Adapted to the Need of the Individual Case.

In the *Pennsylvania Greyhound Lines* case, 303 U.S. 261, the learned Chief Justice quoted this part of the Report of the House Committee on Labor:

" 'The orders will of course be adapted to the need of the individual case; they may include such matters as refraining from collective bargaining with a minority group, recognition of the agency chosen by the majority for the purposes of collective bargaining, posting of appropriate bulletins, refraining from bargaining with an organization corrupted by unfair labor practices.' Report of the House Committee on Labor, supra, pp. 18, 24." (P. 268)

In *Williams Motor Company* v. *N.L.R.B.*, 128 F. (2d), 960, the United States Court of Appeals for the 8th Circuit, used this language:

"In its choice of remedies to effectuate the policies of the Act, a wide range is necessary because the remedy must fit the particular situation of each case." (p. 964)

In the same opinion, we find this language:

"The discretionary power of the Board is to select any remedy which reasonably is adapted to effectuate the policies of the Act and fitted to the particular situation being dealt with by it." (p. 965)

In the case of *National Labor Relations Board* v. *Bradford Dyeing Association*, 310 U.S. 318, Mr. Justice Black, speaking for the Court, said:

"If the Board has acted within the compass of the power given it by Congress, has, on a charge of unfair labor practice, held a 'hearing', which the statute requires, comporting with the standards of fairness inherent in procedural due process, has made findings based upon substantial evidence and has ordered an appropriate remedy, a like obedience to the statutory law on the part of the Court of Appeals requires the court to grant enforcement of the Board's order." (p. 342)

In *N.L.R.B.* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, at 348, Mr. Justice Roberts used this language:

"As we have held in *National Labor Relations Board* v. *Pennsylvania Greyhound Lines*, 303 U.S. 261, the relief which the statute empowers the Board to grant is to be adapted to the situation which calls for redress. * * *"

The ruling is expressed in different language by Mr. Justice Stone, writing for the Court in *N.L.R.B.* v. *Express Publishing Co.*, 312 U.S. 426, at 436 in this wise:

"The breadth of the order, like the injunction of a court, must depend upon the circumstances of each case."

Mr. Justice Frankfurter, writing for the Court in *N.L.R.B.* v. *Seven-up Bottling Co. of Miami, Inc.*, 344 U.S. 344, uses different words of caution:

"* * * It seems more profitable to stick closely to the direction of the Act by considering what order does, as this does, and what order does not, bear appropriate relation to the policies of the Act. Cf. *Labor Board* v. *Gullett Gin Co.*, 340 U.S. 361. * * *"

* * * * * * * * * *

"This is not to say that the Board may apply a remedy it has worked out on the basis of its experience, without regard to circumstances which may make its application to a particular situation oppressive and therefore not calculated to effectuate a policy of the Act. * * *" (p. 349)

F. The primary question in this case has never been decided by this Court. A decision holding that the order of the Board was inappropriate would not be inconsistent with the prior decisions of this Court nor require their modification. The ruling we invoke is consistent with the ruling in *I. A. of M.* v. *Labor Board*, 311 U.S. 72 in which it is said:

"Where as a result of unfair labor practices a union cannot be said to represent an uncoerced majority, the Board has *the power to take appropriate steps to the end that the effect of those practices will be dissipated.* That necessarily involves an exercise of discretion on the part of the Board—discretion involving an expert judgment as to ways and means of protecting the freedom of choice guaranteed to the employees by the Act. It is for the Board, not the courts, to determine how the effect of prior unfair labor practices *may be expunged. National Labor Relations Board* v. *Pennsylvania Greyhound Lines*, 303 U.S. 261; 271; *National Labor Relations Board* v. *Faulk Corp.*, 308 U.S. 453, 461. * * *". (p. 82) (Emphasis supplied)

The importance of the quoted language is magnified by this Court in the case of *Franks Bros. Co.* v. *N.L.R.B.*, 321 U.S. 702 in which, at page 704, we find:

"* * * One of the chief responsibilities of the Board is to direct such action as will dissipate the unwholesome effects of violations of the Act. See 29 U.S.C., Sec. 160 (a) and (c). And, 'It is for the Board, not the courts, to determine how the effect of prior unfair labor practices may be expunged.' *International Association of Machinists* v. *Labor Board*, 311 U.S. 72, 82."

To expunge or dissipate means to wipe out or erase from the minds of the employees the effect of the unfair labor practice. The unfair labor practice was conduct on the part of the employer. The order of the Board directing the employer to take affirmative, corrective steps was followed by the order of the court, but the requirement "unless and until the representative shall have been certified as such by the Board" bearing no relation to the act of expunging the effects of the unfair labor practice from the minds of the employees was properly modified. Those employees were in Birmingham, Gadsden, and Anniston, Alabama; Atlanta, Georgia; Chattanooga and Memphis, Tennessee and Richmond, Virginia. Certification by the Board in Washington would necessarily come after the employees had exercised their freedom of choice. Under the terms of the Act, it could not come before. In the very nature of things, human conduct has effect in the future. Its effect cannot go backward in time. It is only in fantastic science fiction that men can go back in time.

There is no possible way in which a certificate by the Board, subsequent to the untrammelled exercise by the employees of their freedom of choice, could influence that freedom of choice.

G. The Fact That the Board Had Used the Form of Order for Twenty Years Does Not Make the Order Valid or Appropriate.

The use of the "unless and until" certified form of order grew up under the Wagner Act. That Act did not deny the processes of the Board to any labor organization. That Act did not contain anything resembling Section 9 (f) (g) and (h) of the Labor Management Relations Act of 1947, as amended. The cases under the old Act are beside the point.

In continuing the use of the same order after the passage of the Labor Management Relations Act of 1947, as amended, the Board did not take into account the realities of the situation. Under the old Wagner Act, prior to the amendments, neither the employees nor the union selected by them were adversely affected. Under the new Act, such an order adversely affects the union. It amounts to a denial to the employees of the full freedom of choice of their bargaining agent and denies to the chosen labor union the right to represent such employees.

Even if the order had been used for twenty years instead of ten, under the present Act, the Board can acquire no prescriptive right to nullify or amend an Act of Congress. A wrongful or unlawful practice does not become right and lawful merely because of

the passage of time. Whenever this Court, upon re-examination and reconsideration, has concluded that the doctrine of a decision is wrong, it has not hesitated to announce what it conceived to be the correct doctrine. Witness the decision in *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 and its effect on the doctrine of the old case of *Swift* v. *Tyson*, 16 Pet. 1 and how decades of practice under the viewpoint of *Plessy* v. *Ferguson*, 163 U.S. 537 , were abrogated by the decision of *Brown* v. *Board of Education of Topeka*, 347 U.S. 483.

The Constitutional separation of powers prevents the Board from nullifying or amending an Act of Congress. In the case of *Colgate-Palmolive-Peet Co.* v. *N.L.R.B.*, 338 U.S. 355, this language is found:

"It is not necessary for us to justify the policy of Congress. It is enough that we find it in the statute. That policy cannot be defeated by the Board's policy, which would make an unfair labor practice out of that which is authorized by the Act. The Board cannot ignore the plain provisions of a valid contract made in accordance with the letter and the spirit of the statute and reform it to conform to the Board's idea of correct policy. *To sustain the Board's contention would be to permit the Board under the guise of administration to put limitations in the statute not placed there by Congress.*" (Emphasis supplied) (p. 363)

II. The Order of the Court Below Does Not Give District 50 Preferred Treatment.

We submit that the order of the court below does not give District 50 preferred treatment over unions that filed. It simply gives District 50 proper treatment.

The order of the court is adapted "to the factual situation which calls for redress". *N.L.R.B.* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, at 348.

Under the provisions of Section 10 (c), Congress conferred upon the Board the attribute of flexibility. Instead of exercising that attribute, the Board would now apply a rigid rule regardless of the factual situation.

It is easy to see why the unions which elected to file the reports and affidavits specified in Section 9 (f) (g) and (h) have never attacked in this Court the stereotyped form of order in question. They were not hurt. Having already elected to file, such an order did not affect their right to decide for themselves whether they would or would not file.

The fact that they did not contest it does not mean that a requirement of certification is a means of "expunging" or "dissipating" the effect of an unfair labor practice.

District 50 contests the order because it deprives it of a right given it by Congress and deprives those who favor it of the right given to them by Congress freely to choose their representative for purposes of collective bargaining.

One of the first objectives of legal education is to learn to detect differences in factual situations. Courts are constantly engaged in pointing out to lower courts and busy lawyers differences that they have overlooked. We say the situation of District 50 is different from that of the unions which elected to file. Out of different sets of facts, different laws arise.

I. The Fact That an Order or Device May be Lawful Under One Set of Circumstances Does Not Prevent It From Becoming Unlawful Under a Different Set of Circumstances

We read the words of the Great Chief Justice in *McCullough* v. *Maryland*, 4 Wheaton 316 at 421:

"Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are Constitutional."

We believe that if he had had a different case before him, he might well have written:

"Let the end result be unlawful, let it contravene the public policy of the United States embodied in a Constitutional statute, let that end result deprive citizens of rights guaranteed to them and protected by a Constitutional Act of Congress, then whatever means or device, however lawful in appearance it may be, that is used to accomplish that unlawful result is prohibited and unlawful."

In our own less powerful tones, we would say: "There is no lawful means by which an unlawful result may be achieved". This is not strange doctrine. In the case of *Federal Trade Commission* v. *National Lead Company*, 352 U.S. 419 at 430, we find this statement:

"Although the plan might be used for some lawful purposes, decrees often suppress a lawful device when it is used to carry out an unlawful purpose."

The opinion then cites *Ethyl Gasoline Corporation* v. *United States*, 309 U.S. 436, in which, at 461, Mr. Justice Stone writes:

"Since the unlawful control over the jobbers was established and maintained by resort to the licensing device, the decree rightly suppressed it even though it had been or might continue to be used for some lawful purposes."

We submit that the rule should be the same whether the one fashioning the device or using the contrivance is actuated by wrongful motives or high purpose. It matters not whether the Board used the order for the purpose of compelling District 50 to file under Section 9 (f) (g) and (h) or whether it used the device under the mistaken belief that it was the appropriate form of order to use.

Question Number 2

J. This question as stated by Petitioner is: "Whether, assuming that the Board's order was in excess of its authority, the court of appeals erred in rewriting the order instead of remanding the case to the Board."

Section 10 (f) of the Act granted to the court below express power to "enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part, the order of the Board".

We have found but one limitation in Section 10 (f) on the court's power to modify or set aside. It is this: "The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive." Section 10 (e) and (f).

The courts have drawn a distinction between an administrative determination on questions of fact and its decision on a question of law. "* * * an order may

not stand if the agency has misconceived the law. * * * " *Securities & Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, at 94. The decision and order of the court below corrects a misconception of law.

The United States courts of appeal are not conducting a course in advanced composition. Litigation would be indefinitely prolonged if the court had to remand, the Board rewrite, the litigant take a second appeal, the court remand again, the Board try its hand at composition again and the litigant again petition for review.

The court below has done in one step what could easily require two or more steps and two or more appeals if the case were remanded to the Board. Stability in labor relations would not be achieved by such procedures.

The United States Court of Appeal for the Fourth Circuit in a closely similar case remanded the case to the Board because of a question of fact. The language, in *District 50, United Mine Workers of America* v. *N.L.R.B.* and *Pittsburgh Valve Co., et al.* v. *N.L.R.B.*, 234 F. (2d) 565, 571, is:

"We think the Board should have gone into this question and found the facts with regard thereto."

The opinion closed with these words:

"For the reasons stated, the order under review will be set aside and the case will be remanded to the Board for further proceedings not inconsistent herewith."

The Board showed no desire to frame an order not inconsistent with the opinion of Chief Judge Parker. The Board did nothing in that case for about seven months and then avoided framing a proper order by

petitioning that court for leave to dismiss the entire proceedings. See *District 50, United Mine Workers of America* v. *N.L.R.B.* and *Pittsburgh Valve Co., et al.* v. *N.L.R.B.*, 242 F. (2d) 837.

While the courts must be careful not to slide over into areas reserved for administrative decision, they should be equally careful not to slide out of the picture. Congress was very careful to give no District Court power to correct a Labor Board decision. That exclusive jurisdiction was given to the United States Courts of Appeal. Those courts by their reasoning upon legal principles and correction of Board decisions on questions of law can relieve this Court of a great burden.

The National Labor Relations Board in twenty years has placed in its reports approximately one-half as many words as this Court has placed in its reports since the Court first began to sit.

About July 5, 1957, "there were 108 decisions of the Supreme Court of the United States which reviewed N.L.R.B. decisions". Remarks of Honorable Joseph A. Jenkins, Member, National Labor Relations Board before the Labor Law Section of the Texas State Bar Association Convention, Fort Worth, Texas, July 5, 1957, p. 25.

Questions as to the power of the United States Courts of Appeal under the statute do not require as much pinpointing by this Court as do questions in the shadowy zone between state jurisdiction and exclusive Federal jurisdiction.

The frequency with which the Board has changed its views on practically all subjects enhances the importance of judicial review by the United States Courts

of Appeal. The remarks of Hon. Joseph J. Jenkins with reference to the division of the Board on "hot cargo" clauses and conduct pursuant thereto, in the speech above referred to, to wit: "With each change in the membership of the Board a different view has emerged.", might be given a general application.

Question Number 3

K. The two Circuit Judges constituting the majority of the panel in the court below sat on the panel of the court which decided the *Acrovox Corporation* v. *N.L.R.B.*, 211 F. (2d) 640, which refused to eliminate reference to certain labor organizations by name. In that case, however, Judge Wilbur K. Miller dissented. Evidently, Judge Prettyman upon further reflection and further experience in deciding cases in the field of labor relations came to the conclusion that the policy of the Act would best be served by eliminating such reference. It seems to us indisputable that references to the charging union in the Board's form of notice are susceptible of being construed as indicating that the Board preferred Teamsters. The elimination from the notice of all references to the charging union seems to us to be a proper step forward in the complex and changing field of labor relations.

Section 10 (c) deals with parties. A party is present before the Board and has the opportunity to present evidence. Such objections as the party makes at the hearing or before the Board serve to give the Board an opportunity to make further investigation of the factual situation. District 50 was not a party in the original hearing (R. 52).

Does not elimination come within the power of a court to adapt the relief granted by its order to the situation confronting the court?

CONCLUSION

For the reasons stated, the judgment below should be affirmed.

Respectfully submitted,

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APPENDIX

The relevant provisions of the Labor Management Relations Act of 1947, as amended (61 Stat. 136, 65 Stat. 601, 29 U.S.C. 141, *et seq.*) are as follows:

Section 1. Findings and Declaration of Policy (last paragraph)

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection. 61 Stat. 136, 29 U.S.C. 151.

Section 2. Definitions

(4) The term "representatives" includes any individual or labor organization.

(5) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work. 61 Stat. 137, 29 U.S.C. 152 (4) (5).

Section 7. Right of Employees as to Organization, Collective Bargaining, Etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the pur-

pose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158 (a) (3) of this title. 61 Stat. 140, 29 U.S.C. 157.

Section 8. Unfair Labor Practices

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it; * * *.

* * * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159 (a) of this title. 61 Stat. 140, 65 Stat. 601, 29 U.S.C. 158.

Section 9 (a), (f), (g) and (h)

(a) Exclusive representatives; employees' adjustment of grievances directly with employer.

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment; * * *

* * * * * *

(f) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b), of section 160 of this title, unless such labor organization and any national or international labor organization of which such labor organization is an affiliate or constituent unit (A) shall have prior thereto filed with the Secretary of Labor copies of its constitution and bylaws and a report, in such form as the Secretary may prescribe, showing—

(1) the name of such labor organization and the address of its principal place of business;

(2) the names, titles, and compensation and allowances of its three principal officers and of any of its other officers or agents whose aggregate compensation and allowances for the preceding year exceeded $5,000, and the amount of the compensation and allowances paid to each such officer or agent during such year;

(3) the manner in which the officers and agents referred to in clause (2) of this subsection were elected, appointed, or otherwise selected;

(4) the initiation fee or fees which new members are required to pay on becoming members of such labor organization;

(5) the regular dues or fees which members are required to pay in order to remain members in good standing of such labor organization;

(6) a detailed statement of, or reference to provisions of its constitution and bylaws showing the procedure followed with respect to, (a) qualification for or restrictions on membership, (b) election of officers and stewards, (c) calling of regular and special meetings, (d) levying of assessments, (e) imposition of fines, (f) authorization for

bargaining demands, (g) ratification of contract terms, (h) authorization for strikes, (i) authorization for disbursement of union funds, (j) audit of union financial transactions, (k) participation in insurance or other benefit plans, and (l) expulsion of members and the grounds therefor;

and (B) can show that prior thereto it has—

(1) filed with the Secretary of Labor, in such form as the Secretary may prescribe, a report showing all of (a) its receipts of any kind and the sources of such receipts, (b) its total assets and liabilities as of the end of its last fiscal year, (c) the disbursements made by it during such fiscal year, including the purposes for which made; and

(2) furnished to all of the members of such labor organization copies of the financial report required by paragraph (1) of this subdivision to be filed with the Secretary of Labor.

Annual reports by union; contents

(g) It shall be the obligation of all labor organizations to file annually with the Secretary of Labor, in such form as the Secretary of Labor may prescribe, reports bringing up to date the information required to be supplied in the initial filing by subsection (f) (A) of this section, and to file with the Secretary of Labor and furnish to its members annually financial reports in the form and manner prescribed in subsection (f) (B) of this section. No labor organization shall be eligible for certification under this section as the representative of any employees, and no complaint shall issue under section 160 of this title with respect to a charge filed by a labor organization unless it can show that it and any national or international labor organization of which it is an affiliate or constituent unit has complied with its obligation under this subsection.

Affidavits showing union's officers free from Communist Party affiliation or belief

(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 160 of this title, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in; and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35A of the Criminal Code shall be applicable in respect to such affidavits. '61 Stat. 143, 65 Stat. 601, 29 U.S.C. 159.

Section 10. Prevention of Unfair Labor Practices—
(a) Powers of Board generally

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. * * *

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(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take

such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: * * * *And provided further*, That in determining whether a complaint shall issue alleging a violation of subsection (a) (1) or (a) (2) of section 158 of this title, and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. * * *

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(d) Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) The Board shall have power to petition any United States Court of Appeals (including the United States Court of Appeals for the District of Columbia), or if all the United States courts of appeals to which application may be made are in vacation, any United States district court, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree

enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

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(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive. 61 Stat. 146, 62 Stat. 991, 63 Stat. 107; 29 U.S.C. 160.